[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted].120

[redacted] ALLIANCE INSURANCE COMPANY, APPELLANT,

vs.

[redacted] LEWIS, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 26, 1911.

(22,914.)

(22,914.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 838.

GERMAN ALLIANCE INSURANCE COMPANY, APPELLANT,

vs.

IKE LEWIS, AS SUPERINTENDENT OF INSURANCE OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 26, 1911.

1 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Ike Lewis, as Superintendent of Insurance of the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to an order allowing an appeal, entered in the Clerk's office of the Circuit Court of the United States for the District of Kansas, First Division, in that certain action in which German Alliance Insurance Company is complainant and appellant and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said Complainant and Appellant, as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John C. Pollock, Judge of the United States Circuit Court in and for the District of Kansas, First Division, this Second day of October, A. D. 1911.

JOHN C. POLLOCK,
Circuit Judge.

Service of the within citation and the receipt of a copy thereof admitted, this 2nd day of October, A. D. 1911.

JOHN S. DAWSON,
CHAS. BLOOD SMITH,
Solicitors for Ike Lewis, as Superintendent of Insurance of the State of Kansas, Appellee and Defendant.

2 [Endorsed:] No. 8868. German Alliance Insurance Company vs. Ike Lewis as Sup't of Insurance of the State of Kansas. Citation. Filed Oct. 2, 1911. Geo. F. Sharitt, Clerk.

3 UNITED STATES OF AMERICA,
State of Kansas, District of Kansas,
First Division, ss:

In the Circuit Court of the United States for the District of Kansas, First Division.

GERMAN ALLIANCE INSURANCE CO., a Corporation,
v.
CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas.

Bill for Injunction.

To the Honorable Judges of the Circuit Court of the United States of the District of Kansas, First Division, in Chancery Sitting:

Your orator, German Alliance Insurance Company, by Thomas Bates, Z. T. Hazen and Seymour Edgerton, its solicitors, brings this

its Bill of Complaint in its own behalf and in behalf of all other companies and corporations conducting a similar business and similarly situated, who desire to join herein and share the benefits hereof, against Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, the defendant above and hereinafter named, and alleges that it is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York; that it has its principal office and place of business in the City
4 of New York in the State of New York, and that it is a resident and citizen of said State of New York.

That the defendant, Charles W. Barnes, Superintendent of Insurance of the State of Kansas, is the duly elected, qualified and acting Superintendent of Insurance of the State of Kansas, and is the person referred to in the Act of the Legislature of the State of Kansas hereinafter set out. That said Charles W. Barnes resides in the City of Topeka in said State of Kansas, and is a citizen of said State.

That the matter in controversy in this cause exceeds the sum of Two Thousand Dollars, exclusive of interest and costs, and that the controversy herein is one arising under the constitution of the United States of America and the constitution of the State of Kansas in the manner and for the reasons hereinafter more particularly alleged.

Your orator further alleges that it was incorporated under the general laws of the State of New York applicable to the incorporation of fire insurance companies in the year 1897, and that it at once entered upon the business authorized by its charter, and has ever since been conducting the same, to-wit, the business of fire insurance in the State of New York, and that for various long periods of time it has conducted the said business of fire insurance in many of the other states of the United States, including the State of Kansas and elsewhere.

Your orator further alleges that the business of fire insurance as conducted by your orator consists of the making of indemnity contracts with persons, firms and corporations, whereby your orator, in consideration of the payment to it of a certain sum of money by the other party to said contract, agrees to indemnify such other
5 party to the amount in said contract specified against all direct loss or damage by fire to the property in said contract described.

That such indemnity contract is ordinarily known and designated as a fire insurance policy. That the consideration paid by the assured for the making of such contract is ordinarily known and designated as the premium; that the rate or premium rate is the amount charged for each $100.00 of indemnity provided for in the contract; that the property which is the subject of insurance is ordinarily known and designated as the risk.

Your orator further alleges that in the conduct of its business in the State of Kansas and elsewhere, it issues indemnity contracts or fire insurance policies of the character above described, covering all kinds and descriptions of improvements upon real estate and the contents thereof, and all kinds and descriptions of personal property,

including dwelling houses, mercantile buildings, mills and manufacturing establishments, schoolhouses, churches, and municipal buildings, household goods, stocks of merchandise, lumber, and other raw material, machinery and fixtures, and also farm houses, barns and granaries, and their contents.

That the rate of premium charged for such indemnity contracts or policies of fire insurance varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and for many other causes.

Your orator further alleges that the establishment of the basis rate for the premium to be charged and paid for fire insurance covering each particular risk or class of risks in the State of Kansas
6 and elsewhere is a matter of technical and mathematical deduction from the experience of all fire insurance companies, covering a long period of years and territorially the whole civilized world. That to make such deduction it is necessary not only to be in possession of the compiled statistics of the fire insurance business, showing the losses over a long period of time to each class of risk which is the subject of fire insurance and the total insurance during such period covering on such class of risk, and also the total premium receipts from such insurance, but also to be so skilled in the mathematical "theory of probabilities" and in the "law of large numbers" as to be able to apply with technical accuracy such laws to such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

That an approximately correct basis rate for a theoretically perfect risk having been arrived at by scientific deduction from experience as above alleged, that then such basis rate is subject to variation in accordance with the situation of the risk, whether in town or country, and if in the former, in accordance with the class of town or city in which it is situated, such classification of towns and cities being based upon water supply, fire protection afforded, character of pavements and general physical conditions.

That in addition to the basis rate arrived at as above alleged, there must be known and considered in order to ascertain the actual rate of premium to be charged and paid for each individual risk, if a building, the size, the material of which and the manner in which it is constructed, the character of the occupancy and the character of the construction and occupancy of adjacent buildings; if
7 the contents of a building, all of the above mentioned incidents as to the building itself, and also the physical characteristics of the contents, whether they are or are not readily combustible, the method in which they are stored and the precautions used to detect and to prevent fire.

That in ascertaining and recording the various elements, some of which have been above enumerated, knowledge of which is necessary in the intelligent and accurate fixing of a rate for each individual risk, your orator and all others engaged in the fire insurance business in the State of Kansas and elsewhere, are compelled and do employ, directly and indirectly, large numbers of men skilled as inspectors, who examine and report upon each individual risk, and

your orator alleges that it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk in the State of Kansas, without having previously acquired the information above outlined concerning such risk, and then having the same applied by technical experts.

And your orator further alleges that it is impossible for one not in the possession of the information acquired as above set out, and also possessed of the requisite technical and mathematical knowledge which is to be acquired only by special training and study, to determine whether a basic rate or an actual rate as applied to any particular risk is or is not reasonable, and that the defendant herein is not possessed of the requisite information or special training necessary to qualify him to pass upon the question of whether any particular rate, basic or actual, is or is not reasonable, and that any conclusion to which he may come upon such question would
8 be a mere guess or arbitrary determination, and that the provisions of the Act of the Legislature of the State of Kansas hereinafter set out could not be properly administered in any event except by the employment by the State of a corps of inspectors and experts specially trained in the business of fixing the rates of fire insurance.

Your orator further alleges that heretofore, and in the year 1898, it commenced doing business in the State of Kansas, and that from said year down to the present time it has continuously carried on its business of fire insurance in said state, and is now actively engaged therein.

That during all of said time it has complied with all the requirements of the laws of the State of Kansas applicable to foreign insurance companies incorporated under the laws of other states, and doing business in said State of Kansas, and has paid all taxes and license fees required or imposed by the laws of the State of Kansas, and has annually since the year 1898 received the regular license or authorization of the State of Kansas to transact the business of fire insurance therein. That the license Certificate of Authority or authorization last issued to it, and under the authority of which it is now doing business in the State of Kansas, was issued to it on the first day of March, 1909, and was in words and figures following, to-wit:

9 "State of Kansas—Insurance Department.

Charles W. Barnes, Superintendent; I. S. Lewis, Jr., Ass't Superintendent.

Certificate of Authority for the Year Ending the Last Day of February, 1910.

The German Alliance Insurance Company, a corporation organized under the laws of New York, principal office at New York, New York, has complied with all of the requirements of the insurance laws of Kansas, applicable to said company, and the said company

s hereby authorized and empowered to transact such business within he State of Kansas until the last day of February, in the year of ur Lord one thousand nine hundred and ten, unless such certifi- ate is revoked, canceled or suspended by the Superintendent of In- surance for the State of Kansas.

In witness whereof, I, Charles W. Barnes, Superintendent of In- surance for the State of Kansas, have hereto affixed my signature and the seal of the Superintendent of Insurance, in the City of Topeka, Kan., this first day of March, 1909.

[SEAL.] CHARLES W. BARNES,
Superintendent of Insurance.

By ——— ———,
Assistant Superintendent."

Your orator further alleges that it conducts its business of fire insurance in the State of Kansas by means of resident agents and that it now has in said state 72 agents directly employed by it, and actively engaged in the business of fire insurance in said State for your orator. That it now has a large and valuable established busi- ness, and that in the acquiring of such established business, in secur- ing agents to represent it in said State of Kansas, in advertising and in inspecting and mapping the said State, it has, since the year 1898, expended a very large sum of money, and that if your orator is now compelled to give up this business in said State of Kansas, it would result in irreparable damage and injury to your orator.

Your orator further alleges that of the fire insurance policies is- sued by it in the State of Kansas a very large number are written upon farm buildings and their contents, and that in writing such business it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the State of Kansas, and insuring only farm property.

Your orator further alleges that the Legislature of the State of Kansas at its session in the year 1909 passed an Act, which was afterwards and in due form approved in accordance with the pro- visions of the laws of said State, entitled, "An Act Relating to Fire Insurance and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein," being Chap. 152 of the Session Laws of 1909 which said act became in force on the 29th day of May, A. D. 1909, and which said Act is in words and figures following, to-wit:

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. That every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all classes of risks insurable by such fire insurance company in this state, and all charges, credits, terms, privileges and condi- tion which in any wise affect such aforesaid rates or the value of the insurance issued to assured.

SEC. 2. No change shall be made in the schedules which have been filed in compliance with the requirements of this act, except after ten days' notice to the superintendent of insurance, which notice

shall plainly state the changes proposed to be made in the schedules then in force and the time when such changes will go into effect; and such changes shall be shown by filing new schedules, or shall be plainly indicated on the schedules in force at the time; provided, that the superintendent of insurance may, in his discretion
11 and for good cause shown, allow changes upon less than the notice specified herein, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

SEC. 3. When the superintendent of insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable.

SEC. 4. That no fire insurance company shall engage or participate in the insurance of any property located in this state unless the schedule of rates under which such property is insured has been filed in accordance with the provisions of this act; nor shall any fire insurance company write any insurance at a rate different than the rate named in its schedules, or refund or remit in any manner or by any device any portion of the rates so established, or extend to any insured or other person any privileges, advantages, favor, inducement or concession, except as is specified in such schedule.

SEC. 5. Any fire insurance company entering into any contract of insurance on property located within this state for which no rate has been filed by such company as provided in Section 1 of this act, shall within thirty days after entering into such contract, file with the superintendent of insurance in such form as may be required by him, a schedule of such property showing the rate thereon, and such information as may be required by such superintendent of insurance. Such schedule shall conform to the general basis schedules as provided in Section 1, of this act, and when filed shall constitute the premium rate of such company for the described property.

SEC. 6. That all schedules and local tariffs filed in accordance with the provisions of this act shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof, relative to all risks upon which he is authorized to write insurance.

SEC. 7. That no fire insurance company shall directly or indirectly by any special rate, tariff, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less or different compensation for the insurance of any property located in this state than it charges, demands, collects or receives from any other person or persons for like insurance or risks of a like kind and hazard under similar circumstances and conditions in this state; and any fire insurance company violating any of the provisions of this section shall be deemed guilty of

unjust discrimination, which is hereby declared to be unlawful.

12 SEC. 8. That the superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provisions of this act, may in his discretion, revoke the license of such offending company, officer or agent; but the revocation of any license as provided in this section shall in no manner affect the liability of such company, officer, agent or representative, to the infliction of any other penalty hereinafter provided by any other section for violation of this act; and, provided, that any action, decision or determination of the superintendent of insurance under the provisions of this act shall be subject to review by the courts of this state as herein provided.

SEC. 9. The superintendent of insurance shall not make any regulation or order without giving the insurance company concerned reasonable notice thereof, and an opportunity to appear and be heard in respect to the same, and if any insurance company, or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rate adopted by said superintendent of insurance, said party or parties shall have the right within thirty days after the making of said regulation or order to bring an action against said superintendent of insurance in any district court of the State of Kansas to have such regulation or order vacated, and shall set forth in the petition the particular regulation or order complained of and the particular cause or causes of objection to any or all of them, and a summons shall be served upon the superintendent of insurance by delivering a copy thereof to his office at the state capitol, and such service may be had by the clerk delivering a certified copy of said summons by mail to the said superintendent of insurance at his office. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted or fixed by the said superintendent of insurance which shall be by said court found to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the superintendent of insurance shall be granted, provided, that the court may permit any company complaining under this act to write insurance at any rates which obtained prior to the ordering of the rate complained of, by the superintendent of insurance, upon condition that the difference between the rate complained of by the company and the rate at which it seeks to write insurance may be deposited with the superintendent of insurance, and on the final determination of the suit shall be paid by him to the insurance company, if the court shall find it entitled to the same, or to the holders of policies written by said company after the rate complained of was ordered by the superintendent of insur-

13 ance, as the court may deem just and equitable. Whenever any action shall be brought by any insurance company under

the provisions of this section within said period of thirty days, no penalties or forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the order sought to be vacated or modified in said action until the final determination of said suit. Either party to said cause, if dissatisfied with the judgment or decree of said court, may institute proceedings in error in the Supreme Court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and equitable in the premises. No action shall be brought in any of the courts of the United States to set aside any order made by the superintendent of insurance under the provisions of this act before all of the remedies provided for herein shall have been exhausted by the party complaining. And if any company organized under the laws of this state, or authorized to transact the business of insurance in this state by the superintendent of insurance, shall violate this section, the superintendent of insurance may cancel the authority of said insurance company to transact business in this state.

SEC. 10. That any fire insurance company, or any director or officer thereof, or any agent or person acting for or employed by such company, who alone, or with any other corporation, company or person, shall wilfully do or cause to be done, or shall wilfully suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall wilfully omit or fail to do any act, matter or thing in this Act required to be done, or shall cause or wilfully suffer or permit any act, matter or thing so directed by this act to be done, not to be done, or shall be guilty of any infraction of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not to exceed one hundred dollars for each offense; provided, that if the offense for which any person shall be convicted, as aforesaid, shall be an unlawful discrimination, such persons shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding ninety days, or by both such fine and imprisonment.

SEC. 11. No person shall be excused from giving testimony, or producing evidence, when legally called upon so to do at the trial of any other person charged with violation of any of the provisions of this act, on the ground that it may tend to incriminate him under the laws of this state; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence under the authority of this act, except for perjury committed in so testifying; provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property.

14 SEC. 12. This act shall take effect and be in force from and after its publication in the statute book."

Your orator further alleges that Charles W. Barnes, as Superintendent of insurance of the State of Kansas, the defendant herein, immediately after the publication of the said Act in the statute

book, at which time said act by its terms took effect and was in force, proceeded to enforce the provisions thereof, and that the said defendant is now claiming the lawful right to compel your orator and all other companies engaged in the fire insurance business in the State of Kansas, except farmers' mutual insurance companies organized and doing business under the laws of the State of Kansas and insuring only farm property, to comply with the provisions of said act, and is claiming the lawful right and is threatening in the event that any fire insurance company subject to said Act shall by itself or by any of its officers, agents or representatives, violate any of the provisions of said Act, to revoke the license of such offending company, and to inflict upon it and upon its officers, agents and representatives the other penalties provided by said Act for the violation thereof. And your orator alleges that the said Act of the Legislature of the State of Kansas is repugnant to the provisions of the constitution of the State of Kansas and to the provisions of the Constitution of the United States of America as hereinafter more particularly set forth and alleged, and that the said Act is without force and void, and that the defendant herein should be perpetually enjoined from further acting under or in pursuance to said Act, and from in any manner enforcing the same.

15 Your orator alleges that the said Act is unconstitutional and void, for the following specific reasons:

1.

Your orator alleges that by a law of the State of Kansas enacted in the year 1871, there was created a State Department known as the Insurance Department, and that thereafter and by an Act enacted in the year 1898, the legislature of said state provided that said Insurance Department should have a chief officer whose style should be the superintendent of insurance, and that such officer should be charged with the execution of all laws then in force and which might thereafter be passed in relation to insurance and insurance companies doing business in the State of Kansas. That the office so created is entrusted by the said laws of the State of Kansas with duties which are purely executive and administrative; that the defendant, Charles W. Barnes, superintendent of insurance of the State of Kansas, is the present incumbent of said office so created, and that his duties as such superintendent of insurance are to execute all laws enacted by the legislature of the State of Kansas in relation to insurance and insurance companies doing business therein, and that the duties of the defendant in the execution of such laws are purely executive and administrative.

Your orator further alleges that by the constitution of the State of Kansas the various departments of the state government are divided into executive, legislative and judicial, and that by Section 1 of article III. of the constitution of the State of Kansas, it is provided that—

"The judicial power of this State shall be vested in a Supreme Court, District Courts, Probates Courts, Justices of the Peace, and such other courts inferior to the Supreme Court as may be provided by law."

16 That under the constitution of the State of Kansas all judicial power is vested in the bodies above enumerated, and that judicial power cannot be legally exercised by any other persons or courts than as therein specified. That by Section 1 of Article II of the constitution of the State of Kansas the legislative power of said state is vested in a House of Representatives and Senate, and that no legislative power is vested in the State of Kansas in any person or in any body of persons other than those last above enumerated. That by the Constitution of the State of Kansas the Executive Department thereof has neither legislative nor judicial power and cannot legally exercise either of said powers.

Your orator further alleges that the fixing of rates of premium for fire insurance, if the power to fix such rates exists in the state in any event or under any circumstances or conditions, is a strictly legislative function, and that the determining of whether or not rates so fixed are reasonable is, if the power to so determine is in any event a governmental function, an exclusively judicial power; that by the Act of the legislature of the State of Kansas hereinbefore set out, the legislature of said state has attempted to invest the superintendent of insurance of said state, the defendant herein, an executive and administrative officer, with legislative and judicial powers, and your orator alleges that for said reason the said Act is unconstitutional and void.

17 2.

Your orator further alleges that the power to fix the rates of premium for fire insurance, if it exists in the State in any event or under any circumstances or conditions, is a purely legislative function; that the legislature must determine in the first instance definitely and definitively the rule or rules, standard or standards by which particular rates are to be ascertained before the fixing of actual rates may be delegated by the legislature to any administrative body. That by the Act of the legislature of the State of Kansas hereinbefore set out, the legislature of said state merely determined that the rates of fire insurance should be "reasonable." That the term "reasonable" is a relative term; that that which is reasonable from the point of view of one man or body of men is not reasonable to others considering the same question under the same circumstances and surrounded by the same conditions, but from a different standpoint. That between the point at which rates of fire insurance would be confiscatory as to the insurer and that point at which they would be unconscionable as to the insured, there are innumerable points at which such rates might be determined upon as reasonable. That in the absence of any rule or standard fixed by the legislature for determining what was meant by it by the term "reasonable" as used in said Act, the legislature of the State of Kansas has by the said Act attempted to delegate to the superintendent of insurance of said state, the defendant herein, a purely legislative function, and your orator alleges that for such reason the said Act is in that respect repugnant to the provision of the constitution of the State of Kansas hereinabove referred to, and is unconstitutional and void.

18

3.

Your orator further alleges that the business of fire insurance is purely and exclusively a private business, which may be transacted by private persons in their individual capacity, by partnerships, by unincorporated associations, and by incorporated companies; that the amount of indemnity provided by any particular contract and the consideration or premium to be paid therefor is a matter of private negotiation and agreement between the insurer and the insured; that the right to make such contracts by private agreement as between the parties thereto is a valuable property right; that by the Act of the legislature of the State of Kansas hereinbefore set out, the state attempts to regulate the business of fire insurance in so far as the fixing of the rate of premium is concerned, and in such attempted regulation distinguishes in that regard between fire insurance companies and individuals and partnerships engaged in the same business to the disadvantage of the former, and denies, in so far as the fixing of the rate of premium is concerned, to fire insurance companies, including your orator, the equal protection of the laws, and your orator alleges that said Act is therefore repugnant to that portion of Section 1 of the Fourteenth amendment to the constitution of the United States which provides that—

"No State * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws."

and is unconstitutional and void.

19

4.

Your orator further alleges that by the laws of the State of Kansas applicable to fire insurance companies, mutual fire insurance companies may be organized, and transact within said state the business of fire insurance. That such mutual fire insurance companies, having a guaranteed fund of not less than $25,000, may do business on a cash basis and accept premiums in cash, and that the cash premium so paid and received measures the total liability of the insured under the policy either to the company itself or to its creditors; that by the 11th section of the Act of the legislature of the State of Kansas hereinbefore set out, it is provided—

"That nothing in this Act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state, and insuring only farm property."

That many of the fire insurance companies doing business in the State of Kansas, including your orator, other than farmers' mutual insurance companies organized and doing business under the laws of the State of Kansas and insuring only farm property, do insure farm property, and that in writing such insurance such companies, including your orator, come into direct competition with farmers' mutual insurance companies of the character above specified. And your orator alleges that by excepting farmers' mutual insurance companies, organized and doing business under the laws of the State of Kansas and insuring only farm property, from the provisions of said Act of the legislature of the State of Kansas hereinbefore set

out, there is denied to your orator and to all other fire insurance companies doing business in the State of Kansas, and not included in said exception, the equal protection of the laws. And your orator alleges that by reason thereof the said act of the legislature of the state of Kansas, hereinbefore set out is repugnant to that
20 portion of Section 1, the Fourteenth Amendment to the constitution of the United States, which provides that—

"No State * * * shall * * * deny to any person within its jurisdiction the equal protection of the laws,"

and is in that respect unconstitutional and void.

21 5.

Your orator further alleges that the business of fire insurance is purely and exclusively a private business; that the issuing of contracts of indemnity by your orator and by other companies conducting a fire insurance business in the State of Kansas, and the consideration or premium to be charged and paid therefor, are matters of private contract between the insurer and the insured; that with the making of such contracts the state has no right to interfere, and that the right to fix by private contract the rate of premium on such indemnity contracts is a property right of value; that the business of fire insurance, as conducted in the State of Kansas and elsewhere by your orator and by other fire insurance companies is not a monopoly either legal or actual; that the business of fire insurance is not such a business as may be legally conducted by the National Government or by the State of Kansas or by any of the other states of the United States under their respective constitutions, and that such business is not a business included within the functions of government. That your orator does not, nor does any person, partnership, unincorporated association or corporation, whether -ganized under general law or by special legislative Act, and whether organized on the stock or mutual plan, and engaged in the business of fire insurance, receive and enjoy from the State of Kansas or from any other government, state or national, any privilege or immunity not in like manner and to a like extent received and enjoyed by all other persons, partnerships, unincorporated associations and corporations, howsoever organized, respectively, and who and which are
22 engaged in the conduct of other lines of private business and enterprise.

And your orator alleges that by the Act of the legislature of the State of Kansas hereinbefore set out, your orator and all other fire insurance companies doing business in the State of Kansas are deprived of one of the incidents of that liberty which is guaranteed to all citizens by the constitution of the United States, and are also deprived of their property without due process of law, and your orator alleges that for this reason the said Act is repugnant to that part of Section 1 of the Fourteenth Amendment to the constitution of the United States, which provides that—

"No state * * * shall * * * deprive any person of life, liberty or property without due process of law,"

and is unconstitutional and void.

23

6.

Your orator further alleges that the said Act of the legislature of the State of Kansas hereinbefore set out, distinguishes between fire insurance companies doing business in the State of Kansas and not excepted from the provisions of said law, and all other companies engaged in other lines of insurance in the State of Kansas and authorized by the laws of said state, and also that it distinguishes between fire insurance companies doing business in the State of Kansas and not excepted from the provisions of said law and all other persons, partnerships, associations and corporations engaged in other kinds of private business in the State of Kansas in this—that by the provisions of said Act, all fire insurance companies doing business in the State of Kansas and not excepted from its provisions are prohibited from making contracts with all persons desiring indemnity against loss or damage by fire as to the premium and rate of premium to be charged and paid for such contracts, except with the approval of the State, acting through the Superintendent of the Insurance Department of the State, while all other companies engaged in other lines of insurance in the State of Kansas, authorized by the laws of said state, and all other persons, partnerships, associations and corporations engaged in private business of other and different character in said state, are permitted, unrestrained by the state, to make, by private contract with the persons with whom they deal, agreements as to the price at which they will sell their respective commodities. And your orator alleges that such discrimination is to the manifest disadvantage of your orator, and of other fire insurance com-

24 panies doing business in the State of Kansas and not excepted from the provisions of said Act, and that the said Act of the legislature of the State of Kansas hereinabove set out in so distinguishing between fire insurance companies doing business in the State of Kansas, and not excepted from the provisions of said Act, and all other persons, partnerships, associations, unincorporated companies and corporations engaged in other lines of insurance and engaged in private business and enterprise in said state, is repugnant to that portion of Section 1 of the Fourteenth Amendment to the constitution of the United States, which provides that—

"No State shall deny to any persons within its jurisdiction the equal protection of the laws,"

and is unconstitutional and void.

25

7.

Your orator further alleges that by the Act of the legislature of the State of Kansas hereinabove set out, there is delegated by the legislature of said state to the superintendent of insurance of said state, the legislative and judicial function of determining whether or not the basis schedules of fire insurance rates, together with the charges, credits, terms, privileges and conditions affecting the same, as filed by the various fire insurance companies doing business in the State of Kansas, pursuant to the provisions of said Act, are or are not reasonable; and has delegated to the said superintendent of in-

surance authority to fix and determine a rate or rates higher or lower than those contained in the schedules filed as aforesaid, and that the only limitations placed upon the superintendent of insurance by the provisions of said act is that the rate or rates so fixed or determined by him "shall be commensurate with the character of the risk," and that the same shall in every case be "reasonable." And your orator alleges that the determination of whether or not any particular rate is commensurate with the character of the risk, and whether or not any particular rate is reasonable requires not only familiarity with the compiled experience of fire insurance companies and the various matters and things which affect the rate for each particular risk, and the technical skill necessary to apply the same, as hereinbefore in this your orator's bill set out and alleged, but that it also requires keen discrimination and wise judgment and your orator alleges that even if the regulation of the rates of premium of fire insurance is in any event and under any circumstances and conditions a proper governmental function, it is an unreasonable exercise of the legislative power to delegate to one man duties so manifold and complex, and that for such reason the said Act of the legislature of the State of Kansas hereinbefore set out is unconstituional and void.

26 Your orator further alleges that after the said Act went into force, your orator did, under protest, and reserving to itself all rights which it might have under the law, file with Charles W. Barnes, Superintendent of Insurance of the State of Kansas, the defendant herein, general basis schedules showing the rates on all classes of risks insured by it in the State of Kansas, and all charges, credits, terms, privileges and conditions which in any wise affect such rates or the value of the insurance to be issued by your orator to the assured; that the schedules of rates so filed by your orator, together with the charges, credits, terms, privileges and conditions affecting the same, were arrived at by the process hereinbefore set out and alleged, to-wit: By applying to the compiled statistics of the experience of fire insurance companies the said information which had been secured by your orator affecting the various classes of risks and individual risks included in such schedules, the character of which said information has been hereinbefore set out, and that the said schedule of rates filed by your orator, together with the charges, credits, terms, privileges and conditions affecting the same, were the combined result of the experience of fire insurance companies in the various classes of risks and the said information affecting the classes of risks and individual risks in the State of Kansas which had theretofore been obtained by your orator.

Your orator further alleges that thereafter to-wit on or about the 19th day of August, 1909, the defendant, claiming to act under the said Act of the legislature of the State of Kansas hereinbe-

27 fore set out, and claiming under said Act the right so to do entered an order directing your orator and all other companies engaged in the business of fire insurance in the State of Kansas, except the farmers' mutual insurance companies organized and doing business under the laws of the State of Kansas, and insuring only farm property, to make a reduction of twelve per cent from the

rates as filed by your orator, and from the rates as filed by the various other companies engaged in the business of fire insurance in the State of Kansas, with the proviso that such reduction should not apply to residence property, churches, school houses, farm property or special hazards; that such order was by its terms to become effective on September 1st, 1909, and that it was further ordered at such time by the defendant that on and after September 1st, 1909, the exposure charge on dwelling houses should be eliminated.

And your orator alleges that on or about the 31st day of August, 1909, it advised the defendant by letter of said date that it would, under protest, and reserving all rights which it had under the law, comply with the provisions of the said order.

And your orator alleges that the scheduled rates on the risks included within the terms of said order, together with the charges, credits, terms, privileges and conditions which affect the same, when reduced by twelve per cent. result in a rate which is much less than the cost to your orator and to other fire insurance companies doing business in the State of Kansas of carrying such risks, and that the carrying of each individual risk included within the terms of said order at the rate required by said order results in great and direct loss to your orator and to such other fire insurance companies doing business in the State of Kansas as may carry the same.

28 And your orator alleges that the risks included in the terms of said order and not excepted therefrom included all ordinary mercantile risks in the State of Kansas.

And your orator further alleges that it is the purpose of the defendant, and that he has threatened and still threatens, claiming to act under and by virtue of the said Act of the legislature of the State of Kansas hereinbefore set out, to make further reductions in the rate of premium for fire insurance as shown by the schedules filed by your orator, under protest, as aforesaid, pursuant to the provisions of said Act, and that it is the purpose of the said defendant and that he will revoke the license of any fire insurance company, including your orator, which may violate the provisions of the said Act, and which may write policies of fire insurance at rates other than those fixed and determined by the said defendant, even though the rates so fixed by the said defendant be so unreasonably low as to be confiscatory, and that the said defendant also purposes and will inflict upon the directors, officers, agents and employees of all fire insurance companies, including your orator, who shall in any manner violate the provisions of the said Act, the penalties therein prescribed for such violation.

And your orator alleges that your orator and all other fire insurance companies doing business in the State of Kansas and not excepted from the provisions of said Act, will be obliged to comply with the unlawful requirements of the said defendant, claiming to act under the provisions of said Act, or suffer the penalties therein prescribed, including the revocation of its right to do business within the State of Kansas, unless the defendant be restrained by the writ of injunction of this Honorable Court from further proceeding there-

under. That if your orator is obliged by reason of the said
29 unlawful acts of said defendant to cease doing business within the State of Kansas, or if its officers, agents and employees are compelled to pay the penalties imposed by said Act in the event that they in any wise fail to comply with its provisions, that it will result in irreparable damage and injury to your orator.

Your orator further alleges that it is not the purpose or intent of your orator by this its bill to attack the orders hereinbefore referred to, heretofore made by the defendant claiming to act under the provisions of the act of the legislature of the State of Kansas, hereinabove set out, on the ground that such orders were not made in strict compliance with the provisions of said act, but to have the said Act in its entirety declared by this Honorable Court to be unconstitutional and void for the reasons hereinbefore alleged, and to have the defendant herein restrained and enjoined from enforcing orders made by him under the provisions of an unconstitutional and void law.

Forasmuch, therefore, as your orator is without remedy in the premises except in a court of equity, and to the end that the said Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, who is hereby made party defendant to this bill, may be required to make full and direct answer to the same (but not under oath, the answer under oath being hereby expressly waived); that a restraining order may immediately issue by and under the direction of this Honorable Court, enjoining the defendant from further acting under a certain Act of the Legislature of the State of Kansas, entitled, "An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon,
30 and to Prevent Discrimination Therein," approved and in force May 29th, 1909, and enjoining and restraining the said defendant from intefering with your orator in the conduct of its business in the State of Kansas under and as provided by the laws of said State prior to the passage of said Act, and under the licens issued to your orator; and enjoining and restraining the said defendant from revoking the license of your orator, and from inflicting any of the penalties provided in said Act against the officers, directors, agents or employees of your orator; and that upon the final hearing of this cause the said Act entitled, "An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discrimination Therein," may be adjudged and decreed to be unconstitutional, null and void, as being repugnant to the provisions of the constitution of the State of Kansas and of the constitution of the United States for the reasons in this bill of complaint hereinabove set out and alleged; that the defendant may be perpetually enjoined and restrained from in any wise enforcing or attempting to enforce the provisions thereof, and that your orator may have such other and further relief in the premises as the nature of the case may require and to your Honors may seem meet.

May it please your Honors to grant unto your orator the Writ of Subpœna of the United States of America, directed to Charles W.

Barnes, as Superintendent of Insurance of the State of Kansas, the defendant herein, personally to be and appear in this Honorable Court of the — day of ——, A. D. 1910, then and there to make full, true and complete answer unto all and singular the premises, and to stand to and abide by and perform such orders and decrees therein as to your Honors may seem meet.

31 And may it please your Honors to grant unto your orator the people's writ of injunction, to be directed to the said Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, restraining him from further acting under a certain Act of the Legislature of the State of Kansas entitled, "An Act Relating to Fire Insurance, and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discrimination Therein," approved and in force on or about June 1st, 1909, and from interfering with your orator in the conduct of its business in the State of Kansas under and as provided by the laws of said State prior to the passage of the said Act and under the license or certificate of authority issued to your orator, and restraining him from enforcing any of the provisions of said Act, and from revoking the license or certificate of authority of your orator, and from inflicting any of the penalties provided by the said Act against the officers, directors, agents or employees of your orator until the further order of this Court.

And your orator will ever pray, etc.

GERMAN ALLIANCE INSURANCE COMPANY,
Complainant,

By THOMAS BATES,
Z. T. HAZEN & SEYMOUR EDGERTON,
Its Solicitors.

THOMAS BATES,
Z. T. HAZEN,
SEYMOUR EDGERTON,
Solicitors for Complainant and of Counsel.

32 STATE OF ILLINOIS,
County of Cook, ss:

Walter H. Sage, on oath says that he is Western Manager of the German Alliance Insurance Company, complainant to the foregoing bill of complaint, and that he is specially authorized to make this affidavit; that he has read the said bill of complaint and knows the contents thereof, and knows that the matters and things therein alleged are true, except as to those matters and things therein alleged to be upon information and belief, and that as to those he believes them to be true.

WALTER H. SAGE.

Subscribed and sworn to before me this 21st day of February A. D. 1910.

[SEAL.] EDWARD BOBE,
Notary Public.

My commission expires Feb. 4th, 1913.

Endorsed: No. 8868. In the Circuit Court of the U. S. District of Kansas, First Division. German Alliance Insurance Company vs. Chas. W. Barnes, as Supt. of Ins. of State of Kas. Bill for Injunction. Filed Feb. 24, 1910. Geo. F. Sharitt, clerk. German Alliance Insurance Company. By Thomas Bates, Z. T. Hazen, Seymour Edgerton, Its Solicitors.

33 *Chancery Subpœna.*

UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Greeting:

We command you and every of you, that you appear before our Judge of our Circuit Court of the United States of America for the District of Kansas, First Division at the City of Topeka, in said District, on the first Monday in the month of April, next, to answer the Bill of Complaint of German Alliance Insurance Company a corporation, this day filed in the Clerk's office of said Court in said City of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the Marshal of the District of Kansas to Execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Topeka, in said District, this 24th day of February in the year of our Lord one thousand nine hundred and ten.

[SEAL.] GEO. F. SHARITT, *Clerk.*

Memorandum.

The above named defendant is notified that unless he enter his appearance in the Clerk's office of said Court, at the City of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against him as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk.*

34 [Endorsed:] No. 8868. Circuit Court United States, District of Kansas. German Alliance Insurance Company vs. Charles W. Barnes as Supt. of Ins. of State of Kansas. Chancery Subpœna. Returnable to rule day, first Monday in April A. D. 1910. Geo. F. Sharitt, Clerk. —— ——, Deputy Clerk. Filed Feb. 25 A. D. 1910. Geo. F. Sharitt, Clerk. —— ——, Deputy Clerk. Thomas Bates, Z. T. Hazen, & Seymour Edgerton, Comp'ts Sols.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ February the 24th, 1910, and executed the same as follows, to wit: Served on the within named Charles W. Barnes as Superintendent of Insurance of the State of Kansas, personally by delivering a true and certified copy of this writ with all endorsements thereon at Topeka, Kansas on the 24th day of February, 1910.

Fees $2.10.

WILLIAM H. MACKEY, JR.,
U. S. Marshal.
By B. F. FLENNIKEN,
Chief Office Deputy.

35 In the Circuit Court of the United States, District of Kansas.

No. 8868.

THE GERMAN ALLIANCE INSURANCE COMPANY, a Corporation,
Plaintiff,
vs.
CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

Appearance.

To the Clerk of said Court:

Please enter my appearance as attorney for the defendant in the above entitled cause.

F. S. JACKSON,
Attorney General, Attorney for Defendant.

Topeka, Kansas, March 9, 1910.

Endorsed: #8868. Appearance of defendant. Filed M'ch 9, 1910. Geo. F. Sharitt, clerk.

36 In the Circuit Court of the United States, District of Kansas, First Division.

No. 8868.

GERMAN ALLIANCE INSURANCE COMPANY, Plaintiff,
vs.
CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

It is hereby agreed between the counsel in the above entitled action that the defendant may have until June Rules to plead to the Complainant's bill.

THOMAS BATES AND
HAZEN & GAW,
Solicitors for Complainant.
F. S. JACKSON, *Att'y Gen'l.*
CHAS. BLOOD SMITH,
Solicitors for Defendant.

Endorsed: No. 8868. German Alliance Ins. Co. vs. Charles W. Barnes Supt. Ins. Stipulation extending time to plead. Filed May 2, 1910. Geo. F. Sharitt, clerk.

37 In the Circuit Court of the United States for the District of Kansas, First Division.

GERMAN ALLIANCE INSURANCE CO., a Corporation, Complainant,
vs.
CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

It is hereby stipulated by and between counsel for the respective parties in the above entitled suit that the defendant may have until the July rules to plead to complaiant's bill.

THOMAS BATES,
HAZEN & GAW,
Attorneys for Plaintiff.
FRED. S. JACKSON,
CHAS. BLOOD SMITH,
Attorneys for Defendant.

Endorsed: #8868. In the U. S. Circuit Ct. Dist. of Kans. First Div. German Alliance Insurance Co. vs. Charles W. Barnes, Supt. Stipulation. Filed June 1, 1910. Geo. F. Sharitt, clerk.

38 In the Circuit Court of the United States for the District of Kansas, First Division.

THE GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

It is hereby stipulated by the respective counsel in the above entitled case that the defendant may file its demurrer to so much of the complainant's bill as charges the unconstitutionality of the Act of the Legislature of the State of Kansas in controversy in said suit, reserving the right to said defendant, if said demurrer should be overruled, to put in a full and complete answer to the complainant's bill.

THOMAS BATES,
HAZEN & GAW,
Solicitors for Complainant.

CHAS. BLOOD SMITH,
Of Counsel for Defendant.

Endorsed: No. 8868. German Alliance Ins. Co. vs. Chas. W. Barnes Superintendent &c. Stipulation in regard to answer. Filed July 2, 1910. Geo. F. Sharitt, clerk.

39 In the Circuit Court of the United States for the District of Kansas, First Division.

THE GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

The Demurrer of the Defendant to so Much of the Bill of Complaint of Complainant as Charges the Act in Controversy to be Unconstitutional.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur to so much of said bill of complaint as alleges and charges that the Act of the Legislature of the State of Kansas, recited in said bill, being Chapter 152 of the session laws of 1909, is repugnant to the provisions of the Constitution of the State of Kansas and to the provisions of the Constitution of the United States of America, and asserts and charges that said Act is without force and is void for the reasons asserted in said bill, and for cause of demurrer showeth, that said Complainant hath

not by its said bill made such a case as entitles it in a Court of quity to any relief from or against this defendant as to the matters hereinbefore specified, or any of such matters.

Wherefore and for divers other good causes for demurrer in said bill contained as to so much of complainant's said bill as above set forth, this defendant doth demur, and prays the judgment of this Honorable Court whether he shall be compelled to make any further or other answer to such part of said bill as is demurred unto as aforesaid.

I certify that in my opinion the foregoing demurrer of Charles W. Barnes, as Superintendent of Insurance for the State of Kansas, to the bill of complaint of the German Alliance Insurance Company, complainant, is well founded in law and proper to be filed in the above cause.

F. S. JACKSON,
Attorney General, Solicitor and of Counsel for Defendant.

CHAS. BLOOD SMITH,
Of Counsel.

UNITED STATES OF AMERICA,
State and District of Kansas, ss:

Charles W. Barnes, being duly sworn deposes and says that he has read the foregoing demurrer to certain parts of the bill of complaint in this suit and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

CHAS. W. BARNES.

Subscribed and sworn to before me this first day of July, 1910.

[SEAL.] MAUDE FINDLAY,
Notary Public.

My commission expires M'ch 29, 1913.

Endorsed: No. 8868. U. S. Circuit Court. German Alliance Ins. Co. vs. Chas. W. Barnes, Superintendent. Demurrer to part of Bill. Filed July 2, 1910. Geo. F. Sharitt, clerk. F. S. Jackson, Att'y Gen'l, & Chas. Blood Smith, Sol'rs for Def't.

41 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, Complainant,
vs.
CHARLES W. BARNES, as Superintendent of Insurance of the State of Kansas, Defendant.

Memoranda of Decision on Demurrer to Bill of Complaint.

This suit was instituted by complainant, an insurance corporation of the state of New York, engaged in transacting the business of

fire insurance within the state by its permission and authority, to procure a decree perpetually enjoining and restraining defendant, as Superintendent of Insurance, from proceeding further under or in the enforcement of an act of the legislature of the state, entitled, "An Act Relating to Fire Insurance and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discrimination Therein, being Chap. 152 of the Session Laws of 1909, which said act took effect May 29, 1909, by which the legislature assumed to regulate and limit the rates which should be charged for policies of fire insurance in all cases except where the policy is issued by a Farmers' Mutual Insurance Company, organized and doing business under the laws of this state, and insuring only farm property.

The question intended to be presented by the bill for decision, is the constitutional validity of the act. Defendant has de-
42 murred to so much of the bill of complaint as challenges the validity of the act. The act reads, as follows:

"SECTION 1. That every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all classes of risks insurable by such fire insurance company in this state, and all charges, credits, terms, privileges and condition which in any wise effect such aforesaid rates or the value of the insurance issued to assured.

"SEC. 2. No change shall be made in the schedules which have been filed in compliance with the requirements of this act, except after ten days' notice to the superintendent of insurance, which notice shall plainly state the changes proposed to be made in the schedules then in force and the time when such changes will go into effect; and such changes shall be shown by filing new schedules, or shall be plainly indicated on the schedules in force at the time; provided, that the superintendent of insurance may, in his discretion and for good cause shown, allow changes upon less than the notice specified herein, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

"SEC. 3. When the superintendent of insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable.

"SEC. 4. That no fire insurance company shall engage or participate in the insurance of any property located in this state unless the schedules of rates under which such property is insured has been filed in accordance with the provisions of this act; nor shall any fire insurance company write any insurance at a rate different from the rate named in its schedules, or refund or remit in any manner or by any device any portion of the rates so established, or extend to any insured or other person any privileges, advantage,

favor, inducement or concession, except as is specified in such schedule.

"SEC. 5. Any fire insurance company entering into any contract of insurance on property located within this state for which no rate has been filed by such company as provided in section 1 of this act, shall within thirty days after entering into such contract, file with the superintendent of insurance in such form as may be required by him, a schedule of such property showing the rate thereon, and such information as may be required by such superintendent of insurance. Such schedule shall conform to the general basis schedule as provided in Section 1 of this act, and when filed shall constitute the premium rate of such company for the described property.

"SEC. 6. That all schedules and local tariffs filed in accordance with the provisions of this act shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

"SEC. 7. That no fire insurance company shall directly or indirectly by any special rate, tariff, rebate, drawback or other device, charge demand, collect or receive from any person or persons a greater or less or different compensation for the insuance of any property located in this state than it charges, demands, collects or receives from any other person or persons for like insurance or risks of a like kind and hazard under similar circumstances and conditions in this state; and any fire insurance company violating any of the provisions of this section shall be deemed guilty
43 of unjust discrimination, which is hereby declared to be unlawful.

"SEC. 8. That the superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provisions of this act, may in his discretion, revoke the license of such offending company, officer or agent; but the revocation of any license as provided in this section shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty hereinafter provided, by any other section for violation of this act; and, provided, that any action, decision or determination of the superintendent of insurance under the provisions of this act shall be subject to review by the courts of this state as herein provided.

"SEC. 9. The superintendent of insurance shall not make any regulation or order without giving the insurance company concerned reasonable notice thereof, and an opportunity to appear and be heard in respect to the same, and if any insurance company or any other person, city or municipality which shall be interested in said order shall be dissatisfied with any regulation, order or rates adopted by said superintendent of insurance, said party or parties shall have the right within thirty days after the making of said regulation or order to bring an action against said superintendent of insurance in any district court of the State of Kansas to have such regulation or order vacated, and shall set forth in the petition the particular

regulation or order complained of and the particular cause or causes of objection to any or all of them, and a summons shall be served upon the superintendent of insurance by delivering a copy thereof to his office at the state capitol, and such service may be had by the clerk delivering a certified copy of said summons by mail to the said superintendent of insurance at his office. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature; and the court may set aside, vacate or annul one or more or any part of any of the regulations or orders adopted or fixed by the said superintendent of insurance which shall be by said court found to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. No injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the superintendent of insurance shall be granted, provided: that the court may permit any company complaining under this act to write insurance at any rates which obtained prior to the ordering of the rate complained of, by the superintendent of insurance, upon condition that the difference between the rate complained of by the company and the rate at which it seeks to write insurance may be deposited with the superintendent of insurance, and on the final determination of the suit shall be paid by him to the insurance company, if the court shall find it entitled to the same, or to the holders of policies written by said company after the rate complained of was ordered by the superintendent of insurance, as the court may deem just and equitable. Whenever any action shall be brought by any insurance company under the provisions of this section within said period of thirty days, no penalties or forfeitures shall attach or accrue on account of the failure of the plaintiff to comply with the order sought to be vacated or modified in said action until the final determination of said suit. Either party to said cause, if dissatisfied with the judgment or decree of said court, may institute proceedings in error in the Supreme Court as in other civil cases, and said court shall examine the record, including the evidence, and render such judgment as shall be just and equitable, in the premises. No action shall be brought in any of the courts of the United States to set aside any order made by the superintendent of insurance under the provisions of this act before all of the
44 remedies provided for herein shall have been exhausted by the party complaining. And if any company organized under the laws of this state, or authorized to transact the business of insurance in this state by the superintendent of insurance, shall violate this section, the superintendent of insurance may cancel the authority of said insurance company to transact business in this state.

"SEC. 10. That any fire insurance company, or any director or officer thereof, or any agent or person acting for or employed by such company, who alone, or with any other corporation, company or person, shall wilfully do or cause to be done, or shall wiifully suffer or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or who shall wilfully omit or fail to do any act, matter or thing so directed by this act to be done,

not to be done, or shall be guilty of any infraction of this act, shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be punished by a fine not to exceed one hundred dollars for each offense; provided, that if the offense for which any person shall be convicted, as aforesaid, shall be an unlawful discrimination, such persons shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for a term not exceeding ninety days, or by both such fine and imprisonment.

"SEC. 11. No person shall be excused from giving testimony, or producing evidence, when legally called upon so to do at the trial of any other person charged with violation of any of the provisions of this act, on the ground that it may tend to incriminate him under the laws of this state; but no person shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence under the authority of this act, except, for perjury committed in so testifying; provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property.

"SEC. 12. This act shall take effect and be in force from and after its publication in the statute book."

While the bill of complaint charges the act to be repugnant to the several provisions of the Fourteenth Amendment to the national constitution, and Section 1 of Article 3 of the constitution of the state as well, at the oral argument, and in the elaborate and exhaustive brief and argument filed for complainant, but one position is taken and urged with that vigor and reliance which characterizes the presentation to a court of justice of a matter of large importance by earnest, able, and diligent solicitors, thoroughly convinced of the justice and right of their client's cause.

The position thus sought to be maintained by solicitors for complainant in their endeavor to establish the invalidity of the act challenged because in violation of the provisions of the Fourteenth Amendment to the national constitution, may be briefly presented by a statement of the following propositions on which complainant relies.

1. The statute is one providing for the regulation of rates and charges which may be contracted for and received by complainant in this state in the transaction of the business for which it was created and which by the state it is authorized to transact.

2. The act of the state in regulating rates to be paid and charges for the performance of a service or in the transaction of a business authorized to be transacted, is the taking of private property.

3. The power exercised by a state in the regulation of rates and charges to be paid for the performance of a service or the transaction of a business is the power of eminent domain; that is, the power to take private property for a public use only.

4. A contract of fire insurance is a purely private contract of indemnity against loss by fire, and the business of writing such insurance policies or contracts of indemnity for the protection of the property of the citizen against the contingency of loss by fire is a

purely private business, disassociated from and not affected with any public use.

5. Ergo, as a contract of fire insurance written between complainant and a citizen of the state is a purely private contract of indemnity of the citizen against loss by fire, and as the fire insurance business of complainant transacted by it within the state, under authority from the state, is a purely private business, wholly disassociated from and not affected in any manner with a public use, it is beyond the constitutional power of the state to regulate the rates charged by it because such attempted regulation constitutes a taking of its private property for the use and benefit of the private citizen of the state, hence, the attempt of the state to so do by the act in question is in violation of the provisions of the Fourteenth Amendment to the national constitution and void.

46 6. That the exercise by the state of the power of taking private property for a private use attempted to be employed in the passage of the act in question, cannot be justified either under the police power of the state;

7. Or, under its power of admitting foreign corporations within its borders to engage in business on such terms as it may prescribe, or in pursuance of any other power possessed by the state.

From the foregoing statement of fundamental propositions on which complainant bottoms its charge of invalidity against the act, it is seen to be freely conceded by complainant when in any given case the business transacted or the service performed is in its nature public, quasi public or affected with a public use in which the public have an interest, or, in any case where a member of the public may of right demand on any terms the performance of the service, or the transaction of the business, in such cases the law making power of the state may, for the purpose of securing to the public reasonable rates and charges for the service performed or business transacted, and for the purpose of protecting the public from extortion, oppression or unreasonable rates or charges, make such reasonable regulations of rates and charges to be paid therefor as the lawmaking power may deem wise and prudent.

On the contrary, however, it is most earnestly insisted by complainant the business in which it is engaged within the state, under authority of the state, is neither in its inherent nature public, quasi public, nor affected with any public use whatever, but that the business in which it is engaged is in its very nature purely and strictly private between itself and the members of the public with which it deems proper to deal by private contract. In the same manner and to like extent as is the business of the merchant, the grocer or the butcher in dealing with his patrons. That the personal element does and of necessity must enter into the transaction of such business. That the property of one man of known standing, for his

47 care, diligence, probity and honesty may be a good risk, whereas, like property, similarly situated, owned by the weak, the slothful or the vicious is a hazardous risk, and as the rate charged is based absolutely and alone on the risk assumed, from sheer force of necessity and out of a just regard for fairness and honesty in deal-

ing, the greater risk must pay the greater rate. That the act of the state in stepping between the parties in their negotiations over purely private business affairs, and its attempt to regulate their personal contracts, in such manner as to require complainant to indemnify against the risk by fire, the scoundrel who would willingly, if he believed he could escape detection and punishment for his crime, put the brand to his property, on the same terms and conditions as to the compensation to be paid for assuming the risk as is charged the upright and just man, when from the inherent differences between the men themselves who own the properties, and not a difference in the properties insured, the hazard in the one case is greater than in the other, is not alone an unwarranted intermeddling and invasion on the part of the state with the right of private contract possessed by the citizen under the constitution, but is also positively paternalistic and vicious.

The elaborate and exhaustive brief, argument and review of authorities filed and relied upon by complainant in support of the contention made in this behalf, cannot but impress the thinking mind with the gravity of the situation and the ultimate consequences which in the natural order of sequence must follow in the wake of such legislation if it be upheld as valid and be extended to all subject-matters to which it may and undoubtedly will in future be made applicable. However, the question presented to the court to determine in this case does not concern itself, on the one hand with the wisdom or policy of the act, or, on the other, with that state of affairs which will or must inevitably follow in the course of such legislation. The court must consider alone and only, whether beyond all reasonable doubt the act challenged lies clearly without
48 the legitimate exercise of that wide range of constitutional power which the people of the state, with the consent of the nation, have conferred on the law making power of the state, as the lawful exercise of that power has been defined, delimited and declared by those courts whose decisions are controlling here. And, in this regard, it may be observed, the obligation does not rest with those who seek to uphold and maintain the validity of the exercise of power by the state here challenged to point out wherein or whereby the state lays claim to the right to lawfully exercise the power displayed, but it does devolve upon those who deny the exercise of such power to the state to point out with clearness and certainty the precise provision of the national constitution which, in express terms, or by necessary implication, says this thing may not be done; for upon the legislature of this state, by the organic law of the state, is conferred all the legislative power possessed by the people in their collective capacity except such as was by the national constitution conferred on the Congress, or is by the state constitution expressly reserved to the people by prohibitive provisions contained in that instrument.

The very broad and comprehensive language of that provision of the state constitution conferring legislative power, reads, as follows:

"The legislative power of this state shall be vested in a house of representatives and senate." Sec. 1, Article 2, State Constitution. Wherein, then does complainant with that clearness and precision demanded by the occasion point out beyond peradventure or doubt the act challenged to be in violation of the national constitution and thus beyond the power of the state?

It is conceded the act in question does make provision for the regulation of rates and charges in the transaction of the business of fire insurance. That the exercise of the power of fixing or regulating rates is the exercise of legislative power. That the business of fire insurance is a private business and a contract of insur-
49 ance has been declared to be a purely private contract of indemnity. That no one has the right to demand of or to compel an insurance company to contract with him either on such terms as may be agreed between the parties, or such terms as may be prescribed by the law making power of the state. That, generally speaking, it is true, the only power of the state to compel a member of the body public to part with his private property is in aid of the administration of the affairs of the state or government under some form of taxation, a power essential to the continued existence and perpetuity of the state, where the compensation made in return for that taken lies in the protection afforded the donor, or by the exercise of that other sovereign power of eminent domain by which a member of the public is compelled to part with his private property for a public use on just compensation being made him in return, a power, the exercise of which is indispensable to the accomplishment of the purposes of Government, or, where, in the lawful exercise of the police power of the state, private property is seized and confiscated as contraband goods, a power, the exercise of which is essential to the preservation of order and the enforcement of the laws.

Again, it may have been at one time thought by the courts of this country the state could only take the private property of its citizen or those members of the great body politic present in or having property within the state, by the exercise of the one or the other of the powers above enumerated. It may also be conceded the exercise of the legislative power of fixing or regulating rates and charges for services performed or engagements undertaken is an appropriation by the state of private property, for, it is a taking away from the contracting parties of their right of private contract which is private property. Lockber v. New York, 198 U. S. 45; Matthews v. People, 202 Ill. 389; State v. Jones, 129 Mo. 163; Harbinson v. Knoxville Iron Works, 103 Tenn. 421.

It may be further conceded heretofore the exercise of the
50 right to fix or regulate rates and charges has been almost if not altogether confined to those engaged in the transaction of a public business or the transaction of a business affected with a public use. And it may be further conceded, as contended by complainant, it were better in the preservation of the liberties and rights of the individual citizen, both natural and corporate, and would the better tend toward the preservation and perpetuation of

the state itself, if the line of demarcation in the power of the state to interfere in the regulation of the affairs of its citizens, or those transacting business within its borders were absolutely fixed and established by sound and settled judicial decisions, so plain, clear, and cogent that no one might err therein as to his individual rights, that no legislature might dare overstep such rights, and that no court might be found in which such rights would not be known, recognized and enforced. But has this been done?

In the light and trend of recent judicial decisions controlling here, can it be said the state must be denied the right to regulate the rates and charges of either foreign insurance companies transacting business within her borders, as is complainant, or domestic insurance corporations of her own creation, in the exercise of her reserved powers, having in view the great magnitude of the business transacted by such companies, its intimate relation to the commercial business world, and the direct influence the business so transacted has on the prosperity of the individual citizen affected thereby, although it may be conceded never before to have been done, and that no authority expressly authorizing such interference may be found, and although it may have been heretofore thought the foundation stones underlying the right of the state to enact such regulation has been in principle rejected by the more remote adjudications.

In the determination of this question it will be both a use-
51 less and unnecessary labor to attempt a review and discussion of the many authorities on the briefs of solicitors for the respective parties. A reference to a few only of the more recent cases will be attempted. The case of The Noble State Bank v. Haskell et al., — U. S. —, decided January 3rd of this year, was a case in which the legislature of the state of Oklahoma undertook to compel all banking institutions of that state to contribute to a fund to be employed by the state in the liquidation of the debts of any such institution of the state as might become insolvent and unable to pay its depositors. This legislation was challenged as beyond the constitutional power of the state on the seemingly sound ground that in its operation it took the private property of the stockholders of one institution to pay the private obligations of another without the consent and over the protest of the owners. It will be observed there was involved in that case no question of the state's power of taxation. No question of the exercise by the state of the power of eminent domain, no question of the exercise of its police power to take, hold or confiscate contraband property, and apparently no question of the exercise of any other power of the state heretofore exercised under settled and well established authority, yet, the contention of complainant that the act in its operation took its private property for a private use, was met by Mr. Justice Holmes, delivering the opinion of the court, in the following language:

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * There is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection,

there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * * And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."

Again, in defining the police power of the state, and in
52 pointing out the wide extent of its operation, and the infinite variety of objects which by the state may be accomplished thereunder, it is said:

"It may be said in a general way that the police power extends to all the great public needs. Camfield v. United States, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

It is self-evident the decision of the question as to what constitutes "great public needs" or what shall be held by "prevailing morality or strong and preponderant opinion" to be "greatly and immediately necessary to the public welfare" must be left to the law making power of the state, for of such matters courts know nothing and have no means of discovery. It is equally obvious the range of a power so defined, in its operations must be as boundless as the mental desires, imaginations and visions of men.

Again, in speaking of the power of control of the state over the business of banking, which in its nature is a private business, as much as is fire insurance, at least in so far as it relates to mere banks of discount and deposit, it is said:

"We cannot say that the public interests to which we have adverted, and others, are not sufficient to warrant the state in taking the whole business of banking under its control. On the contrary we are of opinion that it may go on from regulation to prohibition except upon such conditions as it may prescribe. In short, when the Oklahoma legislature declares by implication that free banking is a public danger, and that incorporation, inspection and the above-described co-operation are necessary safeguards, this Court certainly cannot say that it is wrong."

Surely, then, if the police power or any power possessed by a state may go to the extent of a compulsory taking of the private property of one banking institution to meet the private obligations of another in the furtherance of a supposedly ultimate benefit to the public, why by the same token and to a like end may the legislature of a state not provide for the regulation of the rates and charges of fire insurance companies transacting business within its borders and with its citizens, although it be conceded the business of fire
53 insurance is a private business, and the regulation thus imposed does constitute the taking of the private property of the insurance company by destroying the free exercise of the right of private contract, it cannot be thought the intangible property of

the insurance company so taken without compensation is more sacred or less inviolate than the tangible property of the bank appropriated by the same means and to the same end.

Not only so, but under the doctrine therein declared the state may take under its control the whole subject of fire insurance and conduct its operations in such manner by such agencies and on such terms and conditions as to form of contract, compensation to be paid for the indemnity from risks secured by its citizens, as the law making power may in its wisdom prescribe.

Again, the power of the state over the transactions of corporate insurance companies, foreign or domestic, the business of which is not within the power of Congress to regulate under the commerce clause of the national constitution, must be conceded to be as plenary as is the power of Congress over interstate commerce under the commerce clause (if we lay aside from consideration for the moment, the public nature of such interstate commerce.) In Atlantic Coast Line Co. v. Riverside Mills, 219 U. S. 186, Mr. Justice Lurton, speaking of the power of Congress to make the initial carrier liable for damages for loss or injury to goods in the hands of a connecting carrier, said:

"It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests."

Again, it is not entirely clear at this late day, as contended by complainant, the business of fire insurance although in its
54 nature a private business, will in future continue to be regarded as entirely unaffected with a public use. Mr. Justice Harlan, delivering the opinion of the court in the recent case of Complainant v. Hale, -- U. S. — wherein the constitutional validity of an act of the state of Alabama, which provided for the recovery by the assured from the company of twenty-five per cent more than the actual loss sustained on the mere showing the company writing the contract belonged to an insurance tariff or rate association, said:

"We concur entirely in the opinion expressed by the state court that the statute does not infringe the Federal Constitution, nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival organizations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is

competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. Carroll v. Greenwich Ins. Co., 190 U. S. 401, 411. Regulations, having a real, substantial relation to that end, and which are not essentially arbitrary, cannot properly be characterized as a deprivation of property without due process of law. They are enacted under the power with which the states have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations and individuals, within the jurisdiction of the state, are subject to such regulations, in respect to their relative rights and duties, as the state may, in the exercise of its police power and in harmony with its own and the federal constitution, prescribe for the public convenience and the general good. Jacobson v. Massachusetts, 197 U. S. 11, 27, 31; Lake Shore &c. v. Ohio, 173 U. S. 285, 297, House v. Mayes, ante, p. 270."

True, in that case, the act was upheld on the ground it was the intent of the legislature in its enactment to prevent (by punishment of forfeiture to the assured) the combination of insurance companies to stifle competition on the theory that competition in business is an ultimate good, whereas, the evident theory and intent of the legislature in the enactment of the act here in controversy, as shown by its text and title, was that competition between insurance companies for business, except mutual insurance companies of the state doing a farm business, is bad in its tendency and should
55 therefore be cut off and destroyed, to the end that all dealing with them may receive like and equal treatment without discrimination. However, the principle involved and underlying the exercise of legislative power is the same in the one case as it is in the other. It is the exercise of the power to regulate the amount received by the complainant from the assured for entering into the contract of indemnity which is involved in this case, and in that it was the exercise of the power to regulate the amount to be paid to the assured in case of loss sustained, regardless of the terms of the contract. The one act is designed to promote, the other, to destroy competition, but that is a question of state policy, not of law.

Without attempting a further discussion of the propositions relied on by complainant in its elaborate brief and argument, or a reference to the many authorities therein cited and elaborated upon in argument, it will suffice to say, in the light of recent decisions, which must control here, I am of the opinion the act challenged does not violate any right secured to complainant by the provisions of the Fourteenth Amendment to the Federal Constitution, and that the act will be upheld as within the legitimate exercise of the law making power of the state.

The demurrer, therefore, to so much of the bill of complaint as challenges the validity of the act, will be sustained.

It is so ordered.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, June 17, 1911.

Endorsed: No. 8868. German Alliance Ins. Co. vs. Chas. W. Barnes, Supt. Ins. Memo. of decision on demurrer to bill. Filed June 17, 1911. Geo. F. Sharitt, Clerk.

56 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

IKE LEWIS, Successor in Office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant.

Now comes the Complainant, German Alliance Insurance Company, by its Solicitors, and suggests to the Court that the term of office of the defendant Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, expired on the 9th day of January, 1910, and that on said date he ceased to be such Superintendent of Insurance; said Complainant further suggests that on said last mentioned date Ike Lewis became and was, and now is the Superintendent of Insurance of the State of Kansas, and as such has succeeded to all the rights, powers and duties of the said Charles W. Barnes as such Superintendent of Insurance.

THOMAS BATES,
Z. T. HAZEN,
SEYMOUR EDGERTON,
Solicitors for Complainant.

57 Endorsed: No. 8868. In the Circuit Court of the United States, District of Kansas, First Division. German Alliance Insurance Company, a corporation, Complainant vs. Ike Lewis, Superintendent of Insurance of the State of Kansas, Defendant. Suggestion for Substitution of Defendant. Filed Oct. 2, 1911. Geo. F. Sharitt, clerk. Thomas Bates, Z. T. Hazen, and Seymour Edgerton, Solicitors for complainant.

58 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

IKE LEWIS, Successor in Office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant.

It having been suggested to the Court by the Complainant herein that the term of office of the defendant Charles W. Barnes as

Superintendent of Insurance of the State of Kansas expired on the 9th day of January, 1911; and it having been further suggested to the Court that on said last mentioned date Ike Lewis became and was, and now is the Superintendent of Insurance of the State of Kansas, and that he has succeeded to all the rights, duties and powers of the said Charles W. Barnes as such Superintendent of Insurance;

Now therefore, it is ordered that the said Ike Lewis as Superintendent of Insurance of the State of Kansas, be, and he hereby is made defendant in the above entitled cause in the place and stead of the said Charles W. Barnes, as Superintendent of Insurance of the State of Kansas.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8868. In the Circuit Court of the United States, District of Kansas, First Division. German Alliance Insurance Company, a corporation complainant vs. Ike Lewis, Superintendent of Insurance of the State of Kansas, Defendant. Order. Ike S. Lewis made def't. Filed Oct. 2, 1911. Geo. F. Sharitt, clerk.

59 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

IKE LEWIS, Successor in Office of Charles W. Barnes, as Supt. of Insurance of the State of Kansas, Defendant.

This cause coming on for hearing upon the demurrer heretofore filed by the defendant to the Bill of Complaint filed by the complainant herein, the complainant appearing by Thomas Bates and Z. T. Hazen, its solicitors, and the defendant appearing by Charles Blood Smith, one of its solicitors, and the court having heard the arguments of counsel, and being fully advised in the premises, sustains the demurrer heretofore filed on behalf of defendant to complainant's bill of complaint. And thereupon the complainant asks leave to amend its bill, which is accordingly done. And thereupon, the defendant takes leave to file a general demurrer, for want of equity, to said bill as amended, which is accordingly done.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, Oct. 2, 1911.

Endorsed: No. 8868. Circuit Court of the United States, District of Kansas First *District*. German Alliance Insurance Company, Complainant vs. Ike Lewis Successor in office of Charles W. Barnes, as Supt. of Ins. of the State of Kansas, Defendant. Order. Filed Oct. 2, 1911 Geo. F. Sharitt clerk.

60 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

vs.

IKE LEWIS, Successor in Office of Charles W. Barnes, as Supt. of Insurance of the State of Kansas, Defendant.

And now comes the solicitors for the complainant in the above entitled cause and pray leave of the court that the following paragraph in the original bill of complaint filed herein be stricken out, to-wit:

"And your orator further alleges that it is impossible for one not in the possession of the information acquired as above set out, and also possessed of the requisite technical and mathematical knowledge which is to be acquired only by special training and study, to determine whether a basic rate or an actual rate as applied to any particular risk is or is not reasonable, and that the defendant herein is not possessed of the requisite information or special training necessary to qualify him to pass upon the question of whether any particular rate, basic or actual, is or is not reasonable, and that any conclusion to which he may come upon such question would be a mere guess or arbitrary determination, and that the provisions of the Act of the Legislature of the State of Kansas hereinafter set out could not be properly administered in any event except by the employment by the State of a corps of inspectors and experts specially trained in the business of fixing the rates of fire insurance."

And the court, being fully advised in the premises does order that the complainant's bill of complaint be amended by striking out from the original bill of complaint the above recited allegations contained in said bill.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, October 2, 1911.

61 Endorsed: #8868. German Alliance Ins. Co. vs. Charles W. Barnes. Order to strike out paragraph from Bill. Filed Oct. 2, 1911. Geo. F. Sharitt, clerk.

62 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, Complainant,
vs.
IKE LEWIS, Successor in Office of Charles W. Barnes, as Supt. of Insurance of the State of Kansas, Defendant.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in said amended bill of complaint to be true, in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause of demurrer showeth that the said complainant hath not by its said amended bill made such a case as entitles it in a court of equity to any relief from or against this defendant touching the matters contained in said amended bill or any of such matters;

Wherefore, and for divers other good causes of demurrer appearing in said amended bill of complaint, this defendant doth demur to said amended bill of complaint and to all the matters and things therein contained, and humbly prays the judgment of this Honorable court whether he shall be compelled to make any further or other answer to said amended bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

I certify that in my opinion, the foregoing demurrer of the defendant to the amended bill of complaint of complainant, is well founded in law and proper to be filed in the above cause.

CHAS. BLOOD SMITH,
Of Counsel.

63 UNITED STATES OF AMERICA,
State of Kansas, Shawnee County, ss:

Ike S. Lewis, being duly sworn, deposes and says: That he has read the foregoing demurrer to the amended bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

IKE S. LEWIS.

Subscribed and sworn to before me this third day of October, 1911.

KATHERINE M. JOHNSON,
Notary Public.

[SEAL.]

My Commission expires August 6, 1913.

JOHN S. DAWSON,
Solicitor for Defendant and Attorney General of the State of Kansas.
CHAS. BLOOD SMITH,
Of Counsel.

Endorsed: No. 8868. U. S. Circuit Court. German Alliance Ins. Co. vs. Ike Lewis, as Supt. of Insurance, State of Ks. Demurrer to Amended Bill. Filed Oct. 2 1911. Geo. F. Sharitt, Clerk. John S. Dawson, Charles Blood Smith, Topeka, Kansas, Sols. for Deft.

64 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,
v.
IKE LEWIS, Successor in Office of Charles W. Barnes, as Supt. of Insurance of the State of Kansas, Defendant.

This cause coming on for hearing upon the demurrer heretofore filed by the defendant to the Amended Bill of Complaint filed by the complainant herein, the complainant appearing by Thomas Bates and Z. T. Hazen, its solicitors, and the defendant appearing by John S. Dawson and Charles Blood Smith, his solicitors, and the court having heard the arguments of counsel, and being fully advised in the premises, sustains the demurrer heretofore filed on behalf of defendant to complainant's bill of complaint as amended and the complainant elects to stand upon its amended bill of complaint heretofore filed by it;

Now, therefore, the Court hereby orders, adjudges and decrees that complainant's amended bill of complaint be and the same is hereby dismissed at the costs of said complainant.

JOHN C. POLLOCK, *Judge.*

Kansas City, Kansas, October 2, 1911.

Endorsed: No. 8868. United States Circuit Court, District of Kansas. German Alliance Insurance Company, a Corporation, Complainant, vs. Ike Lewis as Superintendent of Insurance of the State of Kansas, Defendant. Filed Oct. 2, 1911. Geo. F. Sharitt, Clerk.

65 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,
vs.
IKE LEWIS, Successor in Office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant.

Comes now German Alliance Insurance Company, Complainant in the above entitled cause, by Thomas Bates, Z. T. Hazen and Sey-

mour Edgerton, its Solicitors, and, feeling it is aggrieved by the decision and order made by said Court on the 17th day of June, 1911, wherein and whereby it decided and held that the act of the legislature of the State of Kansas, entitled "An Act Relating to Fire Insurance and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discrimination Therein,"—said act being Chapter 152 of the Session Laws of the State of Kansas for the year 1909—was a legal and valid act and not repugnant to any of the provisions of the Constitution of the United States, and by the decree of said Court made and entered on the 2nd day of October, 1911, dismissing Complainant's amended bill for want of
66 equity pursuant to said decision, hereby prays an appeal to the Supreme Court of the United States for the reasons specified in the Assignment of Errors filed herewith herein; and it prays that this its petition for said appeal may be allowed; that the amount of the bond on appeal may be fixed by this Honorable Court, and that a transcript of the record, papers and proceedings upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States.

GERMAN ALLIANCE INSURANCE COMPANY,
By THOMAS BATES,
Z. T. HAZEN,
SEYMOUR EDGERTON,
Solicitors for Complainant.

67 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,

—

IKE LEWIS, Successor in Office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant.

Comes now the Complainant, German Alliance Insurance Company, and files the following Assignment of Errors, upon which it will rely upon its appeal from the decision, order and decree of this Honorable Court in the above entitled cause:

First. That the said Circuit Court of the United States in and for the District of Kansas, First Division, erred in sustaining the demurrer interposed by the Defendant to Complainant's amended bill of complaint, and by holding and deciding that the matters and things stated in said amended bill of complaint did not constitute a cause of action against the defendant.

Second. That the said court erred in dismissing Complainant's amended bill of complaint for want of equity, and in deciding and adjudging that the act of the legislature of the State of Kansas

entitled: "An Act relating to fire insurance and to provide
68 for the regulation and control of rates of premium thereon and to prevent discrimination therein," said act being Chapter 152 of the Session Laws of the State of Kansas for the year 1909,—was a valid act and not in conflict with any of the provisions of the Constitution of the United States as alleged in Complainant's amended bill of complaint.

Third. That said Court erred in holding and deciding that said act of the legislature of the State of Kansas did not deny to Complainant the equal protection of the laws, contrary to the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

Fourth. That said Court erred in holding and deciding that said act of the legislature of the State of Kansas did not deprive Complainant of its liberty and property without due process of law, contrary to the provisions of Section 1 of the 14th amendment to the Constitution of the United States.

For which errors the Complainant, German Alliance Insurance Company, prays that said order and decree of said Court may be reversed and such directions given that Complainant may receive the relief prayed for by it in its said amended bill of complaint.

GERMAN ALLIANCE INSURANCE COMPANY,
THOMAS BATES,
Z. T. HAZEN,
SEYMOUR EDGERTON,
Solicitors for Complainant.

69 Endorsed: No. 8868. In the Circuit Court of the United States for the District of Kansas, First Division. German Alliance Insurance Company, a corporation, Complainant, vs. Ike Lewis, Successor in office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant. Petition for Appeal and Assignment of Errors. Filed Oct. 2, 1911. Geo. F. Sharitt, clerk. Thomas Bates, Z. T. Hazen and Seymour Edgerton, Solicitors for complainant.

70 In the Circuit Court of the United States for the District of Kansas, First Division.

No. 8868. Equity.

GERMAN ALLIANCE INSURANCE COMPANY, a Corporation, Complainant,
vs.
IKE LEWIS, Successor in Office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, Defendant.

On motion of Thomas Bates, Esq., one of the solicitors for the Complainant in the above entitled cause, it is ordered that the

prayer of Complainant's petition for an appeal to the Supreme Court of the United States from the order and decree of this Court herein, be and the same hereby is allowed; that a transcript of the record, papers and proceedings herein, duly authenticated, be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of $300.00 with sufficient surety, to be approved by the Clerk of this court.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8868. In the Circuit Court of the United States, District of Kansas, First Division. German Alliance Insurance Company, a corporation, Complainant, vs. Ike Lewis, Superintendent of Insurance of the State of Kansas, Defendant. Order allowing appeal. Filed Oct. 2, 1911. Geo. F. Sharitt, Clerk.

71 Know all men by these presents, That we, German Alliance Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as Principal, and the National Surety Company, a corporation organizen and existing under and by virtue of the laws of the State of New York, as Surety, are held and firmly bound unto Ike Lewis, as Superintendent of Insurance of the State of Kansas, in the full and just sum of three hundred (300) dollars, to be paid to the said Ike Lewis, as Superintendent of Insurance of the State of Kansas, his attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 2nd day of October, in the year of our Lord One Thousand Nine Hundred and Eleven.

Whereas, lately, at a session of the Circuit Court of the United States, for the District of Kansas, First Division, in a suit pending in said Court, between German Alliance Insurance Company, a corporation, complainant, and Ike Lewis, as Superintendent of Insurance of the State of Kansas, Defendant, a decree was rendered against the said German Alliance Insurance Company; and the said German Alliance Insurance Company having obtained from said court an order allowing an appeal to the United States Supreme Court, and filed a copy thereof in the Clerk's office of said court, to reverse the decree of the aforesaid suit, and a citation directed to the said Ike Lewis as Superintendent of Insurance of the State of Kansas citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof;

Now, the condition of the above obligation is such that, if the said German Alliance Insurance Company shall prosecute its said appeal to effect and shall answer all damages and costs that may

be awarded againts it if it fail to make its plea good, then the
72 above obligation to be void; otherwise to remain in full force and virtue.

GERMAN ALLIANCE INSURANCE COMPANY, [SEAL.]
By W. H. SAGE, *Manager.*
[SEAL.] NATIONAL SURETY COMPANY,
By RUSSELL A. ALQUE.

Approved:

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 8868. United States Circuit Court, District of Kansas, First Division. German Alliance Insurance Company, a corporation, Complainant, vs. Ike Lewis, as Superintendent of Insurance of the State of Kansas, Defendant. Bond. Wiled Oct. 2, 1911. Geo. F. Sharitt, clerk.

73 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Geo. F. Sharitt, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the record and proceedings in said court in Case No. 8868 wherein German Alliance Insurance Company, a corporation, is complainant, and Ike Lewis, Successor in office of Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, is defendant.

I further certify that the Original Citation is hereto attached and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, in said District of Kansas, this 4th day of October, A. D. 1911.

[The Seal of the Circuit Court of the United States, District of Kansas. 1862.]

GEO. F. SHARITT, *Clerk.*

Endorsed on cover: File No. 22,914. Kansas C. C. U. S. Term No. 838. German Alliance Insurance Company, appellant, vs. Ike Lewis, as Superintendent of Insurance of the State of Kansas. Filed October 20th, 1911. File No. 22,914.

[redacted]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1907.

No. 128.

[redacted]

Brief and Argument for Appellant.

JOHN G. JOHNSON,
THOMAS BATES,
SEYMOUR EDGERTON,
Solicitors for Appellant.

[redacted]

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

GERMAN ALLIANCE INSURANCE COMPANY, *Appellant,* vs. IKE LEWIS, as Superintendent of Insurance of the State of Kansas, *Appellee.*	Appeal from the United States Circuit Court, District of Kansas, First Division.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

In the year 1909, the Legislature of the State of Kansas passed an act entitled "An Act Relating to Fire Insurance and to Provide for the Regulation and Control of Rates of Premium Thereon, and to Prevent Discriminations Therein." Said act was afterwards approved in accordance with the provisions of the laws of Kansas, and became in force on the 29th day of May, A. D. 1909. Said act is shown as Chapter 152 of the Session Laws of 1909 of the State of Kansas, and as Art. 9, Chapter 55, General Statutes of Kansas, 1909.

The act, entitled as above, is set out in full in the

bill of complaint. (Trans. Rec., 5 to 8, incl.) The purpose and effect of the act is to give to the superintendent of insurance, a state officer, the power to fix the rate of premium to be charged and collected on all fire insurance policies written in the State of Kansas by companies not excepted by the act. The act requires all fire insurance companies doing business in the state (except farmer's mutual insurance companies organized under the laws of Kansas, and insuring only farm property) to file with the superintendent of insurance general basis schedules showing the premium rates on all classes of risks insurable in the state, and all charges, credits, etc., which in any wise affect such rates, and which go to make up the rate on each individual risk in the state. The superintendent of insurance is empowered to change the rate so filed upon his own initiative, and to raise or lower the same as he may see fit, the only limitation upon him being that the new rate shall be commensurate with the character of the risk.

The act compels adherence by all companies to the schedule rates as fixed by order of the superintendent of insurance, under penalty of forfeiture of license as to the offending company, and of fine or imprisonment, or both, as to its officers, directors and agents.

The act provides that the superintendent of insurance shall make no order changing the schedule as filed without notice to the company concerned and provides for review by the courts of the State of Kansas of any order or regulation promulgated by the superintendent of insurance, but prohibits

the companies from going into the Federal courts for such relief.

The specially pertinent paragraphs of the act are the following:

> "Sec. 1. That every fire insurance company shall file with the Superintendent of Insurance general basis schedules showing the rates on all classes of risks insurable by such fire insurance company in this state, and all charges, credits, terms, privileges and conditions which in any wise affect such aforesaid rates or the value of the insurance issued to assured." (Trans. Rec., 5.)
>
> "Sec. 3. When the Superintendent of Insurance shall determine that any rate made by an insurance company in this state is excessive or unreasonably high, or that said rate is not adequate to the safety or soundness of the company granting the same, he is authorized to direct said company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk, but in every case the rate shall be reasonable." (Trans. Rec., 6.)
>
> "Sec. 4. That no fire insurance company shall engage or participate in the insurance of any property located in this state unless the schedule of rates under which such property is insured has been filed in accordance with the provisions of this Act; nor shall any fire insurance company write any insurance at a rate different than the rate named in its schedules, or refund or remit in any manner or by any device any portion of the rates so established, or extend to any insured or other person any privileges, advantages, favor, inducement or concession except as is specified in such schedule." (Trans. Rec., 6.)

The appellant, German Alliance Insurance Company, complainant below, is a corporation organized

and existing under and by virtue of the laws of the State of New York, authorized by its charter to conduct the business of fire insurance, and had been for many years prior to 1909 engaged in the business of fire insurance in the State of Kansas.

Ike Lewis, the appellee (successor in office to Charles W. Barnes, the original defendant) is the Superintendent of Insurance of the State of Kansas, and as such is the official empowered by the act of the Legislature of the State of Kansas, above referred to, to enforce its provisions.

In February, 1910, the appellant filed its bill of complaint in the Circuit Court of the United States for the District of Kansas, First Division, against Charles W. Barnes, the then Superintendent of Insurance of the State of Kansas, in which, after describing the character of the business of fire insurance and the method in which it is conducted, the various elements entering into the premium rate charged by insurance companies for contracts of indemnity against loss by fire, and the manner in which the premium is ascertained and fixed, it set out in full the above mentioned act of the Legislature of the State of Kansas, and charged that the same was unconstitutional and void on the ground (among others) that by said act complainant was deprived of its property without due process of law and was thereby denied the equal protection of the laws, contrary to the provision of Sec. 1 of the XIV Amendment of the Constitution of the United States.

It further alleged in its said bill of complaint that

said Charles W. Barnes, as Superintendent of Insurance of the State of Kansas, was proceeding to enforce the provisions of said act. That he had, prior to the filing of the bill, directed appellant and all other companies engaged in the business of fire insurance in the State of Kansas and coming within the terms of the act, to make a reduction of twelve (12) per cent. from the rates as filed to all mercantile risks in the state; that such reduction resulted in a rate which was less than the cost of carrying the risks; that the defendant, as superintendent of insurance, had threatened to order further reductions in rates as filed, and to revoke the license of any fire insurance company which should violate any of the provisions of said act and write fire insurance at rates other than those fixed and determined by him, even though the rates so fixed were so unreasonably low as to be confiscatory, and to impose upon the officers, directors and agents of any fire insurance company which should in any manner violate the provisions of said act, the penalties therein prescribed.

Appellant further alleged in its bill of complaint that it and all other fire insurance companies doing business in Kansas would be obliged to comply with the unlawful requirements of defendant, or suffer the penalties prescribed by the act, which included the revocation of the right to do business in the state, unless the defendant was restrained by the writ of injunction from further proceeding under the act; that if it were compelled to cease business in the State of Kansas, or if the penalties of the act

were imposed upon its officers, directors and agents, it would result in irreparable damage and injury.

The prayer of the bill is for an injunction restraining the defendant, as superintendent of insurance, from further enforcing the provisions of the act, and that upon final hearing the act be decreed to be unconstitutional and void on the ground that same is repugnant to the provisions of the Constitution of the State of Kansas and of the Constitution of the United States as alleged in the bill. (Trans. Rec., 1-17.)

No application was made for a preliminary injunction or stay order.

The defendant appeared and filed a demurrer "to so much of the bill of complaint as charges the act in controversy to be unconstitutional" for want of equity. (Trans. Rec., 21-22.)

The couse then came on to be heard before the Hon. John C. Pollock, judge, upon the motion of complainant to overrule the demurrer. The motion was submitted upon oral argument and written briefs. The court sustained the demurrer, and handed down a memoranda decision which is shown on pages 22-23 of the transcript of the record.

After the sustaining of the demurrer, and in order to perfect the record for this court, appellant took leave to amend its bill, and amended the same by striking out the paragraph appearing on page 4 of the transcript of the record in which it is alleged that the defendant was incompetent to administer the act because of lack of the requisite technical skill and training. (Trans. Rec., 35-36.) The de-

fendant thereupon, by leave of court, filed a general demurrer to the bill as amended for want of equity. (Trans. Rec., 37.) This demurrer was sustained by the court without further argument, and appellant having elected to stand by its amended bill, it was ordered that said amended bill be dismissed at complainant's costs. (Trans. Rec., 38.)

From this order of dismissal an appeal was duly prayed and perfected to this court. (Trans. Rec., 38-42.)

Before the entry of the order dismissing the amended bill, an order was entered, on suggestion, substituting Ike Lewis, the successor in office of Charles W. Barnes as Superintendent of Insurance of the State of Kansas, as defendant. (Trans. Rec., 34-35.)

Error Relied Upon.

Appellant contends that the lower court erred in sustaining the demurrer of defendant to its amended bill, and in dismissing its amended bill for want of equity.

The specific error complained of is the refusal of the lower court to hold that the act of the Legislature of the State of Kansas set out in the bill of complaint is unconstitutional and void because repugnant to that portion of Sec. 1 of the Fourteenth Amendment to the Constitution of the United States which provides that "No state shall deprive any person of life, liberty or property without due process of law." (See assignment of errors, Trans. Rec., 39-40.)

The position of appellant, briefly stated, is that

by the terms of the act complained of the State of Kansas is empowered to and does take the private property of appellant for private use; that the business of fire insurance is a private business and not a public business; that under our constitutional limitations a state has not the power to fix the rates and charges exacted from the citizen for service rendered in a purely private business.

The propositions which we desire to discuss are as follows:

(1) The statute is one providing for the regulation of rates and charges which may be contracted for and received by a private corporation engaged in the fire insurance business in the State of Kansas.

(2) A contract of fire insurance is a purely private contract of indemnity against loss by fire, and the business of writing such insurance policies or contracts of indemnity for the protection of the property of the citizen against loss by fire is a purely private business not affected with any public use.

(3) A contract of fire insurance, written between a fire insurance company and a citizen of the state, is a purely private contract of indemnity of the citizen against loss by fire, and as the fire insurance business of appellant transacted by it within the state under authority from the state, is a purely private business, wholly disassociated from and not effected in any manner with a public use, it is beyond the constitutional power of the state to fix the rates charged by it, because such attempted regulation constitutes a taking of its private property for the use and benefit of the

private citizen of the state; hence, the attempt of the state to do this by the act in question is a violation of the provisions of the Fourteenth Amendment to the National Constitution and is void.

(4) The exercise by the state of the power of taking private property for a private use, attempted to be employed in the passage of the act in question, cannot be justified under the police power of the state.

(5) The exercise by the state of the power to take private property for private use, provided by the act in question, cannot be justified under the power of the state in admitting foreign corporations within its borders to engage in business on such terms as it may prescribe, or in pursuance of any other power possessed by the state, for the reason that no state has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

ARGUMENT.

I.

The business of fire insurance is a private business and the public has no legal right to demand its service.

The business of fire insurance does not come within the definition of a public use, and when the nature of the business is considered it is difficult to understand how such a contention can be seriously made. A company, association *or individual* issuing a policy of fire insurance enters into a contract with the assured whereby it is agreed, subject to certain universally recognized conditions, that if the assured suffers loss by fire, he will be indemnified for such loss up to the amount for which the policy was written. In making such contract, not only the physical characteristics of the property for the loss of which by fire indemnity is desired, is considered, but also the personal character of the proposed insured. If either the one or the other is below the standard set by the particular insurer, the risk is refused. By no legal process known to our law can an insurer be compelled to issue a policy to a person or covering a risk which is in his opinion undesirable.

Every company has its "prohibited list" in which is enumerated certain lines of business and classes of property, which its agents are absolutely pro-

hibited from writing, and the legal reports are full of decided cases in which an agent who has disobeyed the instructions of his principal in this particular, has been held personally liable for the resulting loss.

It is also true that there are in many communities certain individuals who are unable to obtain insurance upon their property because of their bad personal reputation.

The insurer does not pretend to serve the public at large, but only certain approved members owning certain approved classes of property.

The one controlling feature in a public business or public employment is wanting in fire insurance. No citizen of the State of Kansas—no member of the "public," can demand as a right that an insurance policy be issued to him. There must be before such a contract is made a willingness on the part of the insurer to insure as well as on the part of the applicant to be insured.

Where the *right* to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist.

Upon this question, the Supreme Court of Texas in *Queen Insurance Company* v. *State,* 86 Texas 250, said:

> "Insurance is a mere contract for indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, *or one in which the public have any direct right.* No franchise is necessary for its prosecution, *and no one has a right to demand of an underwriter that his property shall*

> *be insured, at any rate.* Any *individual* may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restriction will be found in any charter."

The concluding sentence of the above quotation is exceedingly pertinent when considering the control exercised by the state over the business of fire insurance.

The main object of all controlling legislation is to secure the solvency of the insurer and the protection of the assured against irresponsible insurers. The solvency of an insurance company depends directly upon the care and skill of its underwriting. It is a well known fact that many so-called hazardous risks can only be covered in irresponsible companies—that the "wild cat" insurers secure most of their premiums for assuming risks which the careful underwriter refuses. Nothing could more directly contribute to defeat the purpose of the existing controlling legislation than what the Supreme Court of Texas calls "forced insurance." If the underwriter had no choice but was bound to insure whoever applied for insurance and to cover all kinds of property the absolute ruin of the insurance companies would speedily follow. No rate of premium can compensate for "moral hazard," and whenever "moral hazard" exists the risk is absolutely refused. The existence of "moral hazard" is rarely susceptible of legal proof. The insurance company were it compelled to serve all alike would be in the

position of being unable to justify in a court of law a refusal to insure which all the rules of good underwriting made imperative.

It has been judicially determined that the refusal by an insurance company to issue a policy does not form the basis for an action for damages by the applicant, and that this is true even though two or more insurance companies have conspired in such refusal.

In *Hunt* v. *Simonds et al.*, 19 Mo. 583, a petition was filed by Hunt charging that the defendants, who were officers of various companies in St. Louis, had combined and conspired to injure the plaintiff, and to effectuate such purpose refused without cause to issue policies of insurance upon his property. The court says:

> "Among the numerous cases which have been examined, there has been no one found which presents an aspect like the present. All the cases in which damages have been recovered for injuries produced by individuals conspiring against another, are cases in which some positive act was done by the defendants, in pursuance of a common intent. Here the damage to the plaintiff is alleged to have been produced by the refusal of the defendants to make contracts in the ordinary line of their business. It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others. Inn-kepers, who are bound to entertain strangers, and common car-

riers, who are bound to undertake the transportation of goods, are among such exceptions. But such is not the obligation of underwriters. The business of insuring is but a game of hazard, and there are a great many elements entering into the calculations upon which it can be safely pursued. The seaworthiness of every vessel upon which insurance is asked, is made up of its staunchness and suitable equipment, and the skill, competency and fidelity of its officers and crew; and upon each of these points, very different opinions may be entertained by different persons, as is shown by the cases in which such questions have been in controversy. A man may possess the requisite skill to command a boat, and yet an underwriter may be unwilling to take the hazard of his fidelity, although it may be impossible to prove any particular act of misconduct. While, in the present case, we are to take the plaintiff to be, as is alleged in his petition, a skillful, competent and faithful commander, yet the right of the defendants still remains unaffected, which is to decide for themselves whether they will put their money at risk or not, by insuring upon property under his charge. To assert the contrary is to assert that underwriters are bound in law to insure property whenever insurance is asked, and the vessel is staunch and well equipped, and provided with competent and faithful officers and crew. If, under such circumstances, they are not bound to insure, then the refusal to insure is not the denial of any right belonging to the owner of the property upon which insurance is sought.

The present action, then, is founded upon the idea that the defendants are responsible for an injury sustained by the plaintiff in his occupation, because they conspired to effect that injury, although the means employed were not, in themselves, illegal or immoral. * * *

"Now it is believed to be beyond controversy

that each of the defendants might have declined to take any insurance on the plaintiff's boat, and that, too, from hatred and malice towards the plaintiff, and such individual would not have been liable to an action for such refusal. Nor is it supposed to be less clear that the whole of the defendants might, without combination with each other, have refused the insurance, and none of them would have been subject to an action. * * *

In the present case, the act charged upon the defendants, as having been done by preconcert, was an act which each and every one of the defendants had a right to do, and was no violation of any right which the plaintiff could claim under the law. He had no right in law to demand insurance upon his boat from one or all of the defendants, nor that they should insure cargo upon his boat, and, consequently, their refusal to insure, from any motive, however improper, could give him no right to sue them. * * *

In the present case, taking the petition to be true, as we must upon the demurrer, the plaintiff has sustained great damage by the conduct of the defendants, but, unless we are prepared to say that he had a right to demand that the insurance should be taken on his boat, we can find no violation of any of his legal rights.

The judgment on the demurrer is affirmed."

In a precisely similar case, but decided independently and without citing the case of *Hunt* v. *Simonds, supra*, the Supreme Court of Louisiana came to a similar conclusion.

In *Orr* v. *Home Mutual Ins. Co. et al.*, 12 La Ann. 255, the plaintiff brought suit against the insurance companies claiming damages on the ground that they had conspired to refuse to insure his property, and the court says:

> "Undoubtedly either of the defendants had the right, separately, to decline taking any risk on any boat on which plaintiff should be employed as master. Nor should the motives of the company be questioned. Whether they were malicious and with the sole design of injuring the plaintiff or not will be entirely immaterial from a legal point of view, so long as there was no contract on their part and no legal obligation to insure such boat."

And held that there was no cause of action against the defendants.

In the opinion of the Supreme Court of Missouri the holding that an insurance company may legally, and without laying itself open to an action for damages, refuse to insure the property of an individual, with or without cause, is put upon the ground that such right of refusal exists in all kinds of business, save only public employments, and cites the innkeeper and the common carrier as exceptions to the general rule because they are engaged in public employments and bound to entertain strangers and to undertake the transportation of property without distinction between individuals.

In *American Surety Co.* v. *Schallenberger,* 183 Fed. Rep. 636, it was decided that the business conducted by surety and fidelity companies was not of such a character as gave to the state the power to fix the maximum premium rates to be charged by such companies. The ground of the decision was that the business of such companies *was a private business and not a public one.*

Upon this question Judge MUNGER says:

> "The real controversy in the case is over the

power of the state to fix the rates to be charged for insurance. No case has been cited where such a question has previously arisen, although acts somewhat to the same effect have been passed in other states. Laws of New Hampshire, 1899, c. 85, Par. 1; Laws of Kansas, 1909, c. 152, Par. 3. May the state exercise this power, in view of the Fourteenth Amendment to the Constitution of the United States, which declares that no state shall 'deprive any person of life, liberty, or property, without due process of law.'

The liberty to enter into contracts is not an unrestricted liberty, but is subject to the police power of the state. The extent to which the state may go, in the exercise of this power, in regulating or prescribing the prices of goods or services is not clearly defined. In earlier days it was usual for parliament to fix the rates which lawfully could be charged even by those who were engaged in private business, and such legislation also existed in the colonies before the adoption of our Constitution. Freund on Police Power, Par. 318. The right to regulate the charges for services of those whose business is devoted to a public use has been thoroughly established. It is also well settled that the right exists in the state to regulate the charges to be made by those whose business is affected by a public interest. *Munn* v. *Illinois*, 94 U. S. 113-125, 24 L. Ed. 77; *Budd* v. *New York*, 143 U. S. 517-544, 12 Sup. Ct. 468, 36 L. Ed. 247; *Brass* v. *North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857, 38 L. Ed. 757. The three cases just cited involved the validity of statutes regulating the charges which lawfully might be made by those owning grain elevators and in each case it was declared that the business conducted by them was so affected with a public interest that the state could regulate the charges imposed by them. Some of the characteristics of that business which led the court to declare

it to be affected with a public interest were: The practical monopoly of the business at the places where it was carried on, and the consequent power to levy tribute upon the community; its relation to the business of transportation, and to the business of common carriers, thus being of a *quasi* public character. The business of the companies engaged in furnishing surety bonds has none of these characteristics. It is in no way a monopoly, for individuals and partnerships are free to furnish such bonds in competition with them, and to make any charge or no charge for assuming such risks. No one is compelled to resort to the surety companies as practically the only source from which may be obtained surety bonds. The public interest in the business of such companies is no different in kind, from its interest in the business of any large mercantile or manufacturing company, whose capital, experience and facilities may enable it to have a widely extended patronage, but such characteristics do not make the business one which is affected with a public interest. *State* v. *Associated Press*, 159 Mo. 410, 60 S. W. 91, 51 L. R. A. 151, 81 Am. St. Rep. 368.

If the state may fix the amount of compensation for which an insurer may lawfully contract for furnishing such insurance, the state may dictate the price for which all other commodities shall be sold, including the price which may be paid for labor. This cannot be done. The Fourteenth Amendment to the Constitution protects the right of those engaged in purely private business to fix the price at which they will sell their services or commodities."

In the language of Judge Munger, we might say here that the business of fire insurance companies in furnishing policies of insurance has none of the characteristics of either a railroad company, telephone company, grain elevator or telegraph company.

It is in no way a monopoly, for individuals under the name of Lloyds write this insurance; inter-insurers—that is, associations of large property owners, combine to write insurance for each other, mutual companies, which are merely associations of individuals, write this insurance; and in the case of Lloyds, one individual in some instances writes a policy, and in others, a dozen or twenty individuals join, each one assuming a certain portion of the risk, to write these fire policies. And all of these write at any rate they please and in direct competition with all other associations and corporations. If it is true that the state may fix the rate of compensation for which stock insurance companies may lawfully contract for furnishing such insurance, when there is in this country at least five or six hundred of these corporations which are in competition with each other for the business, then it would seem, as stated by Judge Munger, that the state may dictate the price for which all other commodities shall be sold, including the price which may be paid for labor.

II.

The state has not the power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the test as to whether a use is public or not, is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied.

The case of *Chesapeake & Potomac Telephone Co.*

v. *Manning,* 186 U. S. 238, 246, seems to be conclusive upon this question, and clearly points out the distinction that exists in the power of the state between fixing the charges in a public business and a purely private business.

In that case this court say:

> "*And we start with the proposition that it cannot be presumed that a legislature intends any interference with purely private business. It cannot ordinarily prescribe what an individual or corporation engaged in a purely private business shall charge for services,* and therefore although the language of a statute may be broad enough to include such private business it will generally be excepted therefrom in order to remove all doubts of the validity of the legislation. It appears that some portion of the defendant's business is of a purely private nature, the receipts whereof are spoken of in its reports as private rentals, and as to such business congress could not, if it would, prescribe what shall be charged therefor.
>
> In many buildings, both those belonging to the government or the district, and those belonging to private individuals, is what may be called a local telephone plant; that is, an arrangement of telephones by which parties in different rooms can communicate with each other; a system which is not connected with the general telephone exchange, and is no more public in its nature than the speaking tubes or call bells in a building. It is only for the personal use of parties in the building. By it those in the building cannot communicate with the general public, nor can such public reach parties in the building. It is simply a local convenience for the use solely of those who are in the building. Such combinations of telephone instruments in a single building, with no outside connections, are furnished by the defendant, and

the rentals therefrom, as well as the expenses thereof, are entered in its books of account, and constitute a part of its business. The mere fact that such telephones are furnished by the company, which also does a public business, does not make them a part of such public business, or subject them to the regulation by congress of its charges.

A railroad company may, if authorized by its charter, carry on not simply its strictly railroad business, but also an establishment for the manufacture of cars and locomotives. The fact that it is engaged in these two different works would not in itself subject the manufacture and care of locomotives to the supervision of the legislature, although such body would have the right to regulate the charges for railroad transportation.

So, in an inquiry into the reasonableness of the charges imposed by congress in this legislation, it is essential that the receipts and expenses from such private telephone system be excluded from consideration."

This case clearly shows the distinction that is drawn by all the authorities between the rights of the state over that business which is impressed with a public use and that business which is purely private, and the opinion of the court in the above case is the very best argument that we can use in support of our proposition that the business transacted by the appellant, and other companies similarly situated in the State of Kansas, is a purely private business and the state has no power under the Constitution to fix the price at which its policies shall be sold.

In *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345, which involved the question of

the right to use a private wharf against the objection of the owner, the late Mr. Justice PECKHAM says:

> "The case of *Munn* v. *Illinois*, 94 U. S. 113, 127, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. *Their property was being used with their consent by, and its use devoted to, the public, to any extent desired,* and the only question was in regard to the compensation which they were entitled to ask for the business thus done. The complaint was that the charges were too great and were a violation of a law of the state and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. The court said: 'As you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use, and the right, on the part of the state, to regulate charges which you shall make, to the end that they shall be just and reasonable.' *If the owner of one of these wharves had devoted it to the public use, and permitted the public to use it as it desired, and demanded compensation for such use,* the question as to the amount of such compensation might be raised, as in the Munn class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case."

In the above case it will be noted from the opinion of the court that the Weems Steamboat Company owned certain wharves and rented other wharves. In many instances the wharves so controlled by the Weems Steamboat Company were the only wharves

in the towns on the Rappahannock River and the People's Steamboat Company, claiming that they were public wharves, that their use was devoted to the public to any extent desired, landed at these wharves. The question was the difference between a property which is devoted to a public use and a property which is merely private in its character, owned by private corporations or individuals and controlled and used by them for their private use.

The opinion in the above case is exactly what we are contending for here,—that the business of fire insurance is a private business and in no manner a public business, and its rates, therefore, cannot be fixed by the state. Neither can its use or service be compelled by the state.

The case of *Louisville & N. R. Co.* v. *West Coast Naval Stores Co.,* 198 U. S. 483, is one where the owner permitted some people to make use of his wharf and refused to permit other people to make use of the same wharf, and upon complaint being made by some of the latter, suit was brought and this court in its decision of that case say:

> "The owner was not, it was also said, compelled to use the wharf exclusively for his own business, or else to throw it open for the use of every one that he could not only use it himself and permit others to use it, but might at the same time exclude still others to whom he did not choose to grant such right."

In one of the early cases in this court upholding the validity of railway aid bonds (*Olcutt* v. *Fond du Lac County,* 16 Wall. 678), the question was raised as to whether a railroad was impressed with a pub-

lic use, and Mr. Justice STRONG, in writing the opinion of the court, says:

> "Whether the use of a railroad is a public or a private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the state. Though the ownership is private *the use is public.* So turnpikes, bridges, ferries and canals, although made by individuals under public grants, or by companies, are regarded as *publici juris.* The right to exact tolls or charge freights is granted for a service to the public. The owners may be private companies, *but they are compellable to permit the public to use their works in the manner in which such works can be used.*"

We beg to call the court's attention to the fact that the business of insurance companies and of individuals such as Lloyds, inter-insurance, mutual insurance companies, etc., in the State of Kansas, is not used by the public as it may desire, but on the contrary these companies and individuals sell their insurance by private contract with different individuals and corporations in exactly the same way that other corporations in Kansas sell their coal, their meat, their oil, or any other commodity. In other words, it is a private business, conducted by private corporations, and not a public business, conducted by quasi-public corporations. And neither the state nor the public have the right either to compel the service or to demand the service and we therefore call the court's attention to the fact that the state has no more right to assume the power of

fixing rates to be charged for fire insurance in the State of Kansas than it has to fix the rates at which the great packing corporations of Kansas shall sell their meat or the coal corporations shall sell their fuel.

The case of *Farmers' Market Company* v. *Phila. & Reading Terminal Railway Co.*, 142 Pa. St. 580, involved the question of whether the property of the corporations plaintiff, which were incorporated under special acts of the legislature of the State of Pennsylvania "to erect and maintain buildings, etc., * * * to be appropriated and used as a public market house," was held for a *public use*.

The Supreme Court in deciding this question in the negative adopted the opinion of the lower court, rendered by Hon. RUSSELL THAYER, and which is separately reported in 10 Pa. Co. Ct. 25. After stating that one of the material issues in the case is whether the plaintiffs "have made good their claims *to be corporations existing for public uses, within the true legal meaning of those words,*" he says:

> "Now the meaning of these words, 'for public use,' has been frequently determined in the cases in which the question of the validity of the grant of the right of eminent domain has arisen, where it was necessary to decide whether the purpose for which the property was to be taken was for a 'public use.'
>
> "Clearly, the words do not mean that every use is a public use from which the public may incidentally and temporarily derive an advantage, or benefit or convenience, during the pleasure of the owner of the property, and from which they may be excluded at the mere caprice of the owner. If this definition were accepted, any man's property might be taken upon the

shallowest pretense of a public use. *The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid, or denied, or withdrawn, at the pleasure of the owner.* A particular enterprise, palpably for private advantage, will not become a public use because of the theoretical right of the public to use it. The question is, whether the public have a right to the use. The general public must have a definite and fixed use of the property, a use independent of the will of the private person or corporation in whom the title is vested; a public use which cannot be defeated by the private owner, but which is guarded and controlled by the law. *The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission.* The test is, not what the corporation owning the land *may choose to do, but what under the law it must do,* and whether a public trust is impressed on the land. A franchise for such a public use cannot be granted away. The question of a public use is not affected by the agency employed. It is no more of a public use for being held by a corporation. *To constitute a public use, the property must be under the control of the public, or of public agencies, or the public must have a right to the use.*"

In the language of the court in the above case, we say that in order to show that insurance is a public business, or impressed with a public use, it must be shown conclusively that the general public has a definite use in the business independent of the will of the corporation in which the title is vested; a use which the public may enjoy by right and not by permission.

Insurance is not this kind of a business, because

no man can compel an insurance company to issue to him a policy of insurance, nor can he compel the company to insure his property. On the contrary, the company has the right to accept his insurance or to reject it as it sees fit.

In the case of *Shasta Power Co.* v. *Walker*, 149 Fed. 568, Mr. Justice WOOLVERTON, of the Northern [illegible] of California, after referring to a large number of cases which sustain his conclusion, says:

> "So it would appear from the cases, that in order to entitle a private corporation to exercise the exceptional right of eminent domain, the use which forms the basis of its application therefor must be such as will subserve the public in some appreciable way, *such as it might demand in service as of right and not merely such as may be bestowed at the will and the pleasure, much less at the whim and caprice of the corporation.*
>
> "It is not sufficient that the contemplated improvement will operate as a benefit to the community or the people or property holders thereof by increasing property valuations or compelling facilities for availing themselves of the service that the corporation proposes to supply or afford, for that is altogether foreign to the idea. But the service proposed must be such as *every individual member of the community similarly situated shall have the right to demand and receive upon like conditions as any other member, whether the corporation would accede to the bidding or not.*
>
> "The community might be large or small, or the service might be limited to a few or extended to many. But within the compass of the proposed service every *individual similarly situated should be entitled to it as of right upon like conditions.* * * * *If it may serve whom it pleases and deny whom it pleases, although*

those it accommodates may be a part of the general public, the service becomes of private consequence merely and the real public is ignored. So that, unless all may, under like and similar conditions and circumstances, demand and receive, as of right, it is not a public, but a private service."

In *Gaylord* v. *Sanitary District of Chicago*, 204 Ill. 576, 63 L. R. A. 582, the Supreme Court of Illinois said:

> "It is also the settled doctrine of this court that to constitute a public use something more than a mere benefit to the public must flow from the contemplated improvement. *The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.*"

And in an earlier case the same court, in *Sholl* v. *German Coal Company*, 118 Ill. 427, said:

> "If from the nature of the business and the way in which it is to be conducted it is clear no obligations will be assumed to the public or liability incurred other than such as pertains to all strictly private enterprises, it may safely be concluded the use is private and not public.
>
> "It is also believed to be generally, if not universally true, that benefits resulting from a public use, capable of individual appropriation, are open to all alike upon the same terms and conditions."

In *Ulmer* v. *Railway Co.*, 98 Me. 579, 66 L. R. A. 387, the Supreme Judicial Court of Maine, in passing upon the question of whether the location of a branch railway was a public use to the extent of justifying the exercise of the power of eminent domain, discusses the question of what is meant by

the term "public use" as applied to the particular facts of the case before it, and says:

> "The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact it is not material that few persons will enjoy it."

And again:

> "The tests decisive of this question as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public to be used upon equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, *but as of right*, and if the track is subject to governmental control under general laws, as are the main lines of a railroad, then the use is public and the legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track."

And cites authorities from many states sustaining the test applied.

We respectfully submit that the above opinion clearly distinguishes between a public and a private use. Every one knows that a railroad company that opens its trains to the public is conducting a business which is impressed with a public use, because the public have the right to the use, or, as stated in the opinion, the public can demand that it be served without discrimination, not merely by permission, but as of right. But if, on the contrary, the railroad

be constructed and operated for private purposes only, then the business transacted by that railroad is not impressed with a public use, and its rates cannot be fixed by the state. In other words, it is a private business conducted by a private corporation, instead of a public business conducted by a *quasi* public corporation.

The opinion in the case of *Arnsperger* v. *Crawford*, 101 Md. 247. 70 L. R. A. 497, decided by the Court of Appeals of Maryland, is also very instructive and discusses the question of what is a public use, and as a preliminary, referring to the meaning of the words "public use," the court says:

> "When this is determined the question before us is solved, and all the authorities hold that whether a use is public or private is a question, not for the legislature, but for the judiciary. The legislature cannot make a particular use either public or private merely by so declaring. If it could do so the constitutional restriction would be utterly nugatory, as was said in the case last cited. The constitution does not define the term 'public use,' but leaves us to resort to the natural meaning of the words, and we think this meaning is clearly and correctly expressed by Mr. Lewis in Section 165, in which he says: 'Public use means the same as use by the public.' Giving as his reasons for this conclusion the following: 'First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking property for public use in vogue when the phrase was employed in the earlier constitution, and third, it is the only view which gives these words any force as a limitation or renders them capable of any definite and practical application.'

"There will be found two different views of the meaning of these words which have been taken by the courts, one, there must be a use or right of use by the public or some limited portion of the public; the other, that they are equivalent to public utility or advantage. If the former is the correct view the legislature and the courts have a definite and fixed guide for their action. If the latter is to prevail, the enactment of laws upon this subject will reflect the passing popular feeling and their construction will reflect the various temperaments of the judges who are thus left free to indulge their own views of public utility or advantage.

"We cannot hesitate to range this court with those which hold the former to be the true view. We agree with the Pennsylvania court that '*The test of whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use which cannot be gainsaid or denied or withdrawn at the pleasure of the owner.*'"

In the case of *Jacobs* v. *Water Supply Co.*, 220 Pa. St. 388, the court lays down the following rule:

"To constitute a public use, it is essential that the general public be to some extent entitled to a fixed and definite right to participate in the use, not as a mere matter of favor nor by permission of the owner, but as a matter of right. All the authorities agree that it is not essential that all citizens living in a community should have the same degree of interest in the use. It is sufficient that the general public, or any considerable portion thereof, should have a right to the use."

In *Ryan* v. *Terminal Company*, 102 Tenn. 111, the modern rule is announced as follows:

"So it may be said at the present time that 'anything which will satisfy a reasonable public

> demand for public facilities, for travel or for transmission of intelligence or commodities,' and of which the general public, under reasonable regulations, will have a definite and fixed use independent of the will of the party in whom title is vested, would be a public use."

In the case of *Avery* v. *Vermont Electric Co.*, 75 Vt. 235, the court very clearly distinguishes between a business that is impressed with a public use and one that is not so impressed, and approved the doctrine of the court in *Tyler* v. *Beacher*, 44 Vt. 648, where it was held:

> "That the owner of a grist mill, who was under no obligation to grind for the public, could not flow the lands of another to increase his power, for the reason that the use was private."

The court then refers to Lewis on Eminent Domain, and says:

> "This author considers that mills which are not required by law to serve the public, while they may be a public benefit, are not a public use within the meaning of the constitution."

In *Fallsburg Co.* v. *Alexander*, 101 Va. 98, the court adopts the test applied in the above cited cases, that a public use exists only when the public have the right to the use, and cites *Munn* v. *Ills.*, *Budd* v. *N. Y.*, and *Brass* v. *North Dakota*, as authority for the proposition that when a company "undertakes to devote its property and its products to the public use it becomes subject to public regulations."

This is also the view adopted by the Supreme Court of Kansas. In *Howard Mills* v. *Schwartz Lumber Co.*, 77 Kansas 599, Judge GROVES cites many of the cases above referred to and adopts the language

of the Supreme Court of Minnesota in *Minnesota C. & P. Co.* v. *Koochiching Co.*, 97 Minn. 429, as follows:

> "A use is not public unless the public under proper police regulation has the right to resort to the property for the use for which it is acquired, independently of the mere will or caprice of the person or corporation in which the title of the property would vest upon condemnation."

The court also quotes from *Brown* v. *Gerald*, 100 Me. 351; 70 L. R. A. 472, which has become a leading case, not because of the novelty of the doctrine, but because of the strength of the opinion, as follows:

> "'Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity—to-wit: the state—has a right to create and maintain, and therefore one which all the public has a right to demand and share in. * * *
>
> 'In a broad sense it is the right in the public to an actual use, and not to an incidental benefit. If it be a railroad company the public have a right to be transported, and to have their goods carried from place to place, upon payment of reasonable tolls. The company must accommodate them, whether it will or no. It it be a canal or turnpike, or bridge, all may travel thereon. If it be a boom company, all who have logs in the river are entitled of right to have the booms used for them. If it be a telephone or telegraph company, its privileges are open to and compellable by all. If it be a water company, the entire public has, and must have, a right to the use of the water. These are the more ordinary kinds of quasi-public corporations, and they illustrate better, perhaps, than any definition can express, the particular personal quality of the use which the public, as individuals, have by right in the property of such corporations. It is the right of the public as individuals to use

> when occasion arises. The use must be for the general public, or some portion of it, and not a use by or for particular individuals.'"

In *Citizens' Savings & Loan Assn.* v. *Topeka*, 20 Wall. 655, Mr. Justice MILLER, in writing the opinion of this court, quoted with approval the case of *Allen* v. *Jay*, 60 Me. 124. The latter case is where the Town of Jay had voted bonds for the removal of a saw mill and grist mill to the town. In discussing the effect of the legislative enactment under the authority of which the bonds were issued, and also discussing the question as to whether they were in fact issued for a public purpose, Chief Justice APPLETON uses the following language:

> "The saw mill and grist mill are private property, as are all other mills and farms owned by individuals, carried on for their own use and profit, and enacting that they are for a public use without changing the rights of the people in the least degree as to their right to use them cannot alter the question. It is beyond the legislative power, by force of an enactment, to make that public which is essentially private."

It will be noted, however, that this in *Burlington* v. *Beasley*, 94 U. S. 310, took occasion to consider the same legislative act of the State of Kansas that was before the court in *Citizens' Savings & Loan Assn.* v. *Topeka, supra,* and decided that the bonds issued by the township of Burlington were properly issued under the law for the reason *that the enterprise aided was a steam grist mill which was a public business, and one which was compelled to serve the public as a matter of right and not as a matter of choice.*

In *Dutton* v. *Strong et al.*, 66 U. S. 23, the case

turned upon the question of whether the wharf or the pier of the plaintiffs in error was a public wharf or a private wharf.

Mr. Justice CLIFFORD, in holding that the wharf was a private one, distinguishes the one from the other in the following language:

> "Piers and landing places, and even wharfs, may be private or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure and to exclude all other persons from its use; *or he may be under obligation to concede to others the privilege of landing their vessels there,* upon the payment of reasonable compensation for wharfage."

In the case of *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*, 143 Ill. 210, the court say:

> "But the position is taken on behalf of the complainant, and most strenuously insisted upon, that the live stock market at the Union Stock Yards, by reason of its magnitude and its far-reaching influence upon the commerce of the county, has become a public market, and therefore impressed with a public use, and that not only said market, but all those doing business therein, are brought within the influence of those rules of public policy which apply to and govern public employments, and which it is the business of the court to administer and enforce."

Discussing this contention, the court said:

> "We are not prepared to hold that the mere fact that the business of the particular market has become very large gives to the courts any power to declare such markets public and im-

> pressed with a public use, or to apply to them any rules of public policy peculiar to that class of markets."

And, referring to *Stock Exchange* v. *Board of Trade*, 127 Ill. 153, says:

> "The determining elements present in that case are wanting here. The business which is here sought to be subjected to a public use was, at its commencement, *confessedly private and private only*, and the public use is sought to be impressed upon it, not by virtue of any voluntary grant to the public, but simply because, by mere process of growth and expansion, the business has reached such magnitude as to affect public interests because of its magnitude alone."

It will be noted, therefore, that the question as to whether a business is impressed with a public use is not to be determined by the magnitude of the business. Indeed, we assume that the meat business in the State of Kansas in its magnitude far exceeds that of the insurance business, but no one would claim that the legislature had the right to fix the price of meat. And the same is true of coal and flour and many other commodities. And, therefore, the question of the magnitude of the business does not enter into consideration in any respect.

In the case of *Ladd* v. *Southern Cotton Press Co.*, 53 Texas 172, the same question was presented as is presented in our case, namely, whether the cotton press company could be restrained from charging and collecting unreasonable rates for its service, and upon that question the Supreme Court of Texas say:

> "The business of warehousing and compress-

> ing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public, nor is it claimed to have been made so by statute, and we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent."

If we strike out the words "warehousing and compressing cotton" from the above quotation, and in lieu thereof insert the word "insurance", you would have an exact statement of our position in this case.

The Supreme Court of Texas, in another case, that of *Queen Insurance Company* v. *State*, 86 Texas 250, heretofore cited, passed upon many of the questions involved here, and say:

> "Insurance is a mere contract of indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, *or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter.* Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restriction will be found in any charter. Labor is necessary to production and transportation, and therefore it is not merely an aid, but a necessity of commerce. It is advantageous to the public, and in that

> sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground."

In the case of *People* v. *Steele*, 231 Ill. 340, the question arose as to the constitutionality of a law passed by the legislature to prevent scalping in the sale of theater tickets, requiring the price of tickets to be stamped thereon, and prohibiting their sale for more than the price stamped on the ticket.

Steele, who conducted the theater, violated the law by issuing unstamped tickets, and proceedings were brought against him to impose the penalties provided for by the statute. The suit was resisted because the statute infringed the same articles of the constition as those set out in our bill, and the court, in holding the law constitutional, say (and for brevity we quote from the syllabus):

> "The legislature has power to regulate a theater as a place of amusement, and may require a license fee for conducting the business. But the fact that a license fee may be required does not change the character of the business from a private one to one impressed with a public interest.

> The legislature has the same power to regulate the theater business as it has to regulate any other private business, and no more, and may interfere with such business only to the extent that the public health, safety, morals, comfort and general welfare may require."

In this case it will be noted that the theater was held to have the right to sell its tickets at any price it pleased and the state could not fix the price at which they should be sold.

The Supreme Court of Pennsylvania, in the case of *Horney* v. *Nixon*, 213 Pa. St. 20, came to a like conclusion, and in refuting the argument advanced by appellant based upon the legal relation between a common carrier and the public, said:

> "The proprietor of a theater is a private individual, engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit everyone who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state, and is therefore under no implied obligation to serve the public."

In exactly the same way an insurance company has the right to sell its insurance to any one it pleases—to refuse to sell it as it sees fit.

The case of *State, ex rel. Star Publishing Co.* v. *Associated Press*, 159 Mo. 410, asserts exactly the same doctrine.

Hurley v. *Eddingfield*, 156 Ind. 416, is a case where a physician was sued for damages for refusing without reason to attend a sick person. It was

contended that because of the Indiana statute regulating the practice of medicine, requiring examination, license, etc., the business or profession of a physician had been made a public employment. In briefly disposing of this argument and affirming a judgment in favor of the defendant, the court says:

> "The act is a preventative, not a compulsive, measure. In obtaining the state's license (permission) to practice medicine, the state does not require, and the license does not engage, that he will practice at all or on other terms than he may choose to accept. Counsel's analogies, drawn from the obligations to the public on the part of innkeepers, common carriers, and the like, are beside the mark."

To the same effect are *Collister* v. *Hayman*, 183 N. Y. 250; *Purcell* v. *Daly*, 19 Abbott (N. C.) 301; *Pearce* v. *Spalding*, 12 Mo. App. 141; *Ex parte Quarg*, 149 Cal. 79.

Under all these authorities, and numerous others that might be cited, we respectfully submit and insist that the business of insurance is a purely private business, and under the constitution of the United States the state has no right to fix the price at which it shall be sold; indeed we confidently insist that there is no authority which holds that a private business transacted either by a private corporation or a private individual in which the public have no right to demand and receive the use or the service is subject to having the price it shall receive for its commodities fixed by the state.

III.

The Regulation of Rates and Charges in a Private Business is Not Within the Police Power of the State.

In every state laws exist regulating the business of fire insurance in many respects.

Many of these regulating acts were passed for the purpose of securing the solvency of companies conducting fire insurance business within the state, the imposition of taxes, etc., and restrictions have also been imposed upon the agents through whom the companies do business, and in all of the states an insurance commissioner or the insurance department is given the power of administering the various regulating statutes, and in a certain restricted sense a general supervision and control over the business.

The various restricting and regulating statutes above referred to have been held to be valid and constitutional enactments under the power vested in the legislature of the state to pass laws whose purpose is the health, safety, morals and general welfare of the people.

Upon this point, however, there are certain well-defined limitations.

There may be some difficulty in defining the extent of the police power, still there can be no question upon the proposition that under the guise of police power the legislature cannot take away any of the rights guaranteed by the Constitution. In other

words, the police power must end where the Constitution begins, and when the legislature enacts a law which prohibits a corporation engaged in a purely private business from making contracts upon such terms as may be agreed upon between it and its customers, we respectfully submit it takes from that corporation the rights which are guaranteed to it by the Constitution.

This question of limitations upon the police power has been so often discussed in courts that it is difficult to select from the many decided cases, but the conclusions that are reached in these opinions are practically the same.

In *Lawton* v. *Steel*, 152 U. S. 133, the question is discussed at some length, and particularly with reference to the power of the courts to determine in the last instance whether or not an Act passed by the legislature and claimed to be within the police power of the state was in fact a proper exercise of that power.

On page 136 it is said:

> "*The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business* or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police power is not final or conclusive, but is subject to the supervision of the courts."

In *Dobbins* v. *Los Angeles*, 195 U. S. 223, Mr. Justice Day referring to that part of the opinion in *Munn* v. *Illinois* which seems to hold that the legislature is the exclusive judge of the propriety of

police regulations when the matter is within the scope of its power, says:

> "The observations of Mr. Chief Justice Waite in that connection had reference to the facts of the particular case and were certainly not intended to declare the right of either the legislature or a city council to arbitrarily deprive the citizen of rights protected by the Constitution, under the guise of exercising the police powers reserved to the states. It may be admitted that every intendment is to be made in favor of the lawfulness of the exercise of municipal power, making regulations to promote the public health and safety, and that it is not the province of courts, except in clear cases, to interfere with the exercise of the power reposed by law in municipal corporations for the protection of local rights and the health and welfare of the people in the community. But notwithstanding this general rule of the law, it is now thoroughly well settled by decisions of this court that municipal by-laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, *there has been an unwarranted and arbitrary interference with the constitutional rights to carry on a lawful business, to make contracts, or to use and enjoy property.*

And follows with quotations from *Lawton* v. *Steel*, 152 U. S. 133, *Holden* v. *Hardy*, 169 U. S. 366, *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, to the effect that the exercise of the police power by a legislative body is always subject to the supervisions of the courts, and is always limited by the provisions of the National Constitution.

Upon the principal limitation upon the exercise of the police power by the legislature, nothing can be stronger or more to the point than the words of Mr. Justice HARLAN in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540:

> "The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the 'police powers' of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the states when the Constitution was ordained. But, as the Constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to the law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power by appropriate legislation to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

In this case it is most earnestly contended on behalf of appellant that the regulation of rates and charges is to be ascribed to the inherent power of government to take private property for public use.

That it is the exercise of a power above and beyond the police power—that it is no more within the police power than is the taking of private property by taxation or by the exercise of the power of "eminent domain."

This question is hereafter more fully considered under heading IX of this brief.

In the case of *Hurtado* v. *California*, 110 U. S. 516, referring to the powers of the legislatures of different states, Mr. Justice MATTHEWS, speaking for the court, says:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. * * * Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. *The enforcement of these limitations by judicial process is the device of self-governing communities* to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

In the case of *Ex parte Dickey*, 144 Cal. 234; 66 L. R. A. 928, the question before the court was

whether a statute of California, which provided that the charges to be made by employment agencies for securing employment for individuals should be fixed at a certain price, was constitutional, or whether such a statute was void as in violation of the rights guaranteed by the Constitution of the United States.

We submit that the question is substantially the same as that presented here.

In this case and upon that question the court say:

> "The due exercise of the police power is limited to the preservation of the public health, safety and morals, and that legislation which transcends these objects, whatever other justification it may claim for its existence, cannot be upheld as a legitimate police legislation.
>
> "The business in which this defendant is engaged is not only innocent and innocuous, but is highly beneficial, as tending the more quickly to secure labor for the unemployed. There is nothing in the nature of the business, therefore, that in any way threatens or endangers the public health, safety or morals. Nor, indeed, is the purpose of this statute to regulate in these regards, or in any of them. The declared purpose and the plain effect of the above-quoted section is to limit the right of an employment agent in making contracts,—a right free to those who follow other vocations,—and arbitrarily to fix the compensation which he may receive for the services which he renders.
>
> "Here, then, is laid down a most drastic rule governing the conduct of a man in the prosecution of a harmless, legitimate and beneficial business. Under the Constitution of the United States and of this state, the protection guaranteed in the possession of property and in the pursuit of happiness is extended, as of necessity it must be, to cover the right to acquire property, and the right to acquire property must and

does include the employment of proper means to that end.

"Says Judge COOLEY (Constitutional Limitations, 7th ed. p. 889): 'The general rule undoubtedly is that any person is at liberty to pursue any lawful calling, and to do so in his own way not encroaching upon the rights of others, This general right cannot be taken away.'

"And this court has said (*Ex parte Newman*, 9 Cal. 517): 'The right to protect and possess property is not more clearly protected by the Constitution than the right to acquire. The right to acquire must include the right to use the proper means to attain the end. The right itself would be impotent without the power to use its necessary incidents. The legislature therefore cannot prohibit the proper use of the means of acquiring property, except the peace and safety of the state require it.'

"In strict accord with this is the language of the Supreme Court of the United States in *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383: 'As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a state law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision (due process of law). Indeed, we may go a step further, and say that, as property can only be legally acquired, as between living persons, by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be equally invalid."

"And says Judge COOLEY (p. 588), treating of this same subject-matter: 'The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in a manner before un-

known to the law, could be sustained, notwithstanding its generality. Distinctions in these respects must rest upon some reason upon which they can be defended,—like the want of capacity in infants and insane persons, and if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. To forbid to an individual or a class the right to the acquisition or enjoyment of property in such manner as should be permitted to the community at large would be to deprive them of liberty in particulars of primary importance to their "pursuit of happiness"; and those who should claim a right to do so ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived.'

"The application of these principles to the statute under consideration leads to the following irresistible conclusion. The petitioner is engaged in a harmless and beneficial business. As part of his 'property' in that business are the services that he renders in obtaining employment for those seeking it It is not compulsory upon any one to employ him, and who so seeks to avail himself of his services is at liberty to reject them if the terms of the contract for compensation are not satisfactory to him. This right of contract common to the followers of all legitimate vocations is an asset of the petitioner in his chosen occupation, and, as has been said, is a part of the property in the enjoyment of which he is guaranteed protection by the Consti-

tution. By the act in question he is arbitrarily stripped of this right of contract, and deprived of his property, and left, in following his vocation and in pursuit of his livelihood, circumscribed and hampered by a law not applicable to his fellow men in other occupations. Such legislation is of the class discussed by Judge Cooley in the paragraph above quoted,—'entirely arbitrary in its character, and restricting the rights, privileges, or legal capacities' of one class of citizens 'in a manner before unknown to the law.' For such legislation, as he very justly adds, those who claim its validity should be able to show a specific authority therefor, 'instead of calling upon others to show how and where the authority is negatived.' And where, it may be asked, could the line be drawn, if the legislature, under the guise of its police power, should thus be permitted to encroach upon the rights of one class of citizens? Why should not the butcher and the baker, dealing in the necessaries of life, be restricted in their right of contract, and, consequently, in their profits, to 10, 5, or 1 per cent.? Why should not the contractor, the merchant, the professional man, be likewise subjected to such paternal laws, and why might not the legislature fix the price and value of the services of labor?

"The law is clearly one of those, the danger of whose enactment was foreshadowed by this court in *Ex parte Jentzsch*, 112 Cal. 468; 32 L. R. A. 664, 44 Pac. 803, when it said: 'So, while the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the Republic. For the difficulty which is experienced in defining its just limits and bounds affords a temptation to the legislature to encroach upon the rights of citizens with experimental laws, none the less dangerous because well meant.'"

We beg the court will excuse the long quotation

from this case, for the reason that we present it not only as enunciating sound principles of law but as also a strong argument in support of our contention here.

In the case of *Street* v. *Varney Electrical Supply Co.*, 160 Ind. 338; 61 L. R. A. 154, the court considered a statute of the State of Indiana, which provided that where work was done for the state or for municipal corporations, there should be paid to unskilled laborers not less than 20 cents per hour for their services.

It was conceded that, whilst the state would not have the right to impose this restriction upon private parties, or private corporations, yet, that in the case of the state or the county or municipal corporations, the state had the right to fix this limitation.

In considering that question, and holding the statute unconstitutional, the Supreme Court of Indiana say:

> "It is not contended, and it could not be maintained, that the restrictions in this act upon the right of contract would be valid if the act applied to the work and affairs of private citizens. Even if no express provision of any constitution forbade such legislative interference with the right of contract, it would be void, for the reason that the authority to fix by contract the prices to be paid for property, including human labor, is not ordinarily within the domain of legislation. But such enactments are also held to be in violation of Sec. 1, Art. 1, of the state constitution, securing to every citizen of the state the inalienable right to personal liberty and to the pursuit of happiness.
>
> "But it is argued in support of the validity of the act that no specific provision of the fed-

eral or state constitution inhibits this species of legislation, and that counties, cities and towns are mere political and municipal subdivisions of the state, through which the government is administered. It is said that the state has the power to fix the salaries of its officers, and the wages it will pay to its agents and employes; therefore, it has the right to declare what rate of wages shall be paid to the agents and employes of a county, city or town employed upon any public work.

"While the counties, cities and towns are political and municipal subdivisions of the state, they are not governmental agencies in such sense as to subject the management of their local affairs, involving the making of contracts for labor and materials to be used upon local improvements, and the payment of the same out of the revenues of the county, city or town, to the arbitrary and unlimited control of the legislature. They are corporations as well as political and governmental subdivisions and agencies and, as such corporations, they have the power to make contracts by which the rate of compensation for property sold to them is fixed. With regard to such contracts for the purchase of property or the employment of labor, counties, cities and towns stand much upon the same footing as private corporations and they cannot be compelled by an act of the legislature to pay for any species of property more than it is worth, or more than its market value at the time and in the place where it is contracted for.

"The power to confiscate the property of the citizens and taxpayers of a county, city or town by forcing them to pay for any commodity, whether it be merchandise or labor, an arbitrary price, in excess of the market value, is not one of the powers of the legislature over municipal corporations, nor the legitimate use of such corporations as agencies of the state. If an act compelled counties, cities and towns to pay to

all stone masons not less than $2 per perch for stone to be used on any public work, when the market price of stone was but $1.50 per perch, or to the brickmaker not less than $12 per thousand for brick, when brick of the same quality could be bought for $10 per thousand, or to the hardware merchant not less than 6 cents per pound for iron, when iron of the same quality could be had for 4 cents per pound, such legislation would shock every reasonable mind, and would be universally condemned as unwarranted and unconstitutional. For the same reasons an act fixing the price of unskilled labor on all public works at not less than 20 cents an hour is a legislative interference with the liberty of contract by counties, cities and towns, which finds no sanction or authority in the doctrine that counties, cities and towns are municipal and political subdivisions of the state. * * *

"The liberty to contract, subject only to such limitations as may be imposed by the legislature in the legitimate exercise of the police power for the public welfare, is not only secured by the constitution of this state, but is undoubtedly within the protection of the Federal Constitution also, and is covered by the Fourteenth Amendment thereof, which provides that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" (Citing authorities.)

"Corporations, both public and private, are entitled to the benefit of this provision for the preservation and protection of their right to make contracts affecting their local affairs." (Citing authorities.)

"If the legislature has the right to fix the minimum rate of wages to be paid for common labor then it has the power to fix the maximum rate. And if it can regulate the price of labor it may also regulate the prices of flour, fuel,

merchandise and land. But these are powers which have never been conceded to the legislature, and their exercise by the state would be utterly inconsistent with our ideas of civil liberty. * * *

"Statutes similar to this have been before the courts of other states, and in nearly every instance have been held unconstitutional."

In the case of *People* v. *Steele, supra,* 231 Ill. 340, decided in 1907, the court considered a statute of Illinois which required that, when a theater company sold a ticket it should stamp thereon the price of the ticket, and that no one should sell the ticket at a higher price than that so stamped. The court held the statute unconstitutional, and, after quoting those provisions of the constitution set out in our bill, say:

"While the legislature may determine when the exigency exists for the exercise of the police power, it is for the courts to determine what are the subjects for the exercise of this power, and it is necessary that the act should have some reasonable relation to the subjects of such power. The courts must be able to see that the act tends in some degree to the prevention of offenses or the preservation of the public health, morals, safety or welfare. It must be apparent that such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. (Citing authorities.)

"Liberty, as that term is used in the constitution, means not only freedom of the citizen from servitude and restraint, but is deemed to embrace the right of every man to be free in the use of his powers and faculties and to adopt and pursue such avocation or calling as he may choose, subject only to the restraints necessary

to secure the common welfare. (Citing authorities.)

"'The right of every man to choose his own occupation, profession or employment, though not expressly guaranteed by the constitution, is included in the right to the pursuit of happiness.' (Black on Constitutional Law, p. 411.) The privilege of contracting is both a liberty and a property right and is protected by the constitution. (Citing authorities.)

"The statute prohibits the sale of a theater ticket at a price above the printed rate and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theater tickets at an advance over the price at the box office. Such sale is not injurious to the public welfare and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theater. The buyer purchases voluntarily. He is under no compulsion. If the conducting of a theater is a mere private business there is no reason why the proprietor may not sell the tickets when and where, at what prices and on what terms he chooses.

"It is insisted, however, that the operation of a theater is a business affected with a public interest and therefore is subject to control by the legislature. It is a well established doctrine that where the owner of property has devoted it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must to the extent of that interest submit to be controlled by the public for the common good, so long as such use is maintained. (Citing authorities.) * * *

"In *Horney* v. *Nixon*, 213 Pa. 20, the plaintiff brought a suit in trespass against the defendant for wrongfully refusing to permit him to occupy a seat which he had purchased for a theatrical performance. The court held that his only remedy was an action for the breach of the con-

tract, and said: 'The proprietor of a theater is a private individual engaged in a strictly private business, which, though for the entertainment of the public, is always limited to those whom he may agree to admit to it. There is no duty, as in the case of a common carrier, to admit every one who may apply and be willing to pay for a ticket, for the theater proprietor has acquired no peculiar rights and privileges from the state and is therefore under no implied obligation to serve the public.'

"In *Collister* v. *Hayman,* 183 N. Y. 250, the court said: 'A theater may be licensed, like a circus; but the license is not a franchise, and does not place the proprietors under any duty to the public or under any obligation to keep the theater open. * * * The defendants were conducting a private business, which, even if clothed with a public interest, was without a franchise to accommodate the public, and they had the right to control it the same as the proprietor of any other business, subject to such obligations as were placed upon them by the statute hereinafter mentioned. Unlike a carrier of passengers, for instance, with a franchise from the state, and hence under obligation to transport any one who applies and to continue the business year in and year out, the proprietors of a theater can open and close their place at will and no one can make lawful complaint. They can charge what they choose for admission to their theater. They can limit the number admitted. They can refuse to sell tickets and collect the price of admission at the door. They can preserve order and enforce quiet while the performance is going on. They can make it a part of the contract and a condition of admission, by giving due notice and printing the condition in the ticket, that no one shall be admitted under twenty-one years of age, or that men only or women only shall be admitted, or that a woman cannot enter unless she is accompanied

> by a male escort, and the like. The proprietors in the control of their business, may regulate the terms of admission in any reasonable way. If those terms are not satisfactory, no one is obliged to buy a ticket or make the contract.' "

We beg the court to note that in the above case the legislature did not go so far as to fix the price which should be charged, but it allowed the theater company to fix any price it pleased, and only provided that the ticket should not be sold for a higher price than that fixed by the theater company itself, whilst in our case the statute fixes the price absolutely—not a minimum price or a maximum price—but fixes the exact price, arbitrarily, at which we shall issue every policy in the State of Kansas and this in a purely private business, transacted by a purely private corporation which clearly has the right to agree with its customers on the price at which its insurance shall be sold.

We confidently assert that there is no decision of any court which has gone so far as this, or which has held that the legislature has the right to fix the price at which a corporation engaged in a private business shall sell its commodities.

From the large number of decisions of the various courts holding to exactly the same proposition as that in the case above cited, we only desire to call the court's attention to one other, and that is the case of *People ex rel. Rodgers* v. *Coler*, 166 N. Y. 1; 52 L. R. A. 814, which is a case very similar to the Indiana case.

In that case the statute provided that all contractors doing work for municipalities should pay the

prevailing rate for a day's work in the same trade or occupation, and the same price as is paid by others in that locality for like work and labor.

In passing upon the constitutionality of the statute the Court of Appeals of New York say:

> "It may regulate, but cannot destroy, powers recognized by the constitution as inherent in the cities of the state. The plain purpose and effect of the law in question was to deprive the city and its contractors of the exercise of all judgment and discretion in the matter of wages to be paid to workmen employed upon all public works. Both the city and the contractor are deprived by the statute of all power to deal with that question, and, consequently, of all power to protect most vital interests in that regard by contract or otherwise. The right which is conceded to every private individual and every private corporation in the state to make their own contracts and their own bargains is denied to cities and to contractors for city work, and moreover, if the latter attempt to assert such right, the money earned on the contract is declared to be forfeited to the city without the intervention of any legal process or judicial decree. The exercise of such a power is inconsistent with the principles of civil liberty, the preservation and enforcement of which was the main purpose in view when the constitution was enacted. If the legislature has power to deprive cities and their contractors of the right to agree with their workmen upon rates of compensation, why has it not the same power with respect to all private persons and all private corporations? That question can be answered in the language which this court used when a case with features somewhat similar was under consideration: 'Such legislation may invade one class of rights today and another tomorrow, and, if it can be sanctioned under the constitution,

> while far removed in time we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' (*Re* Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.)"

In the case of *Lochner* v. *New York*, 198 U. S. 45, which involved a statute of New York which attempted to fix the number of hours that bakers should work at their trade, and this statute the court held to be invalid as an arbitrary or unlawful interference with the right of private contract. In the course of the opinion by Mr. Justice PECKHAM the court says:

> "We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of the individuals who are following the trade of a baker. If this statute be valid, and if therefore a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employe, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution there would seem to be no length to which legislation of this nature might go." (58)

And again, in the same opinion, referring to some of the arguments that were used to support this law, he says:

> "If this be a valid argument and a justifica-

> tion for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired." (60)

Again, in *Adair* v. *United States*, 208 U. S. 161, there came under consideration a federal statute making it an offense for a carrier to discharge an employe simply because he belonged to a labor organization. The lower federal court had held the statute valid. On appeal to this court it was held to be invalid, as being an arbitrary interference with the right to buy and sell labor. In the course of the opinion the court says:

> "While, as already suggested, the rights of liberty and property guaranteed by the constitution against deprivation without due process of law, is subject to such reasonable restraints as the common good or the general welfare may require, it is not within the functions of government—at least in the absence of contract between the parties—to compel any person in the course of his business and against his will to accept or retain the personal services of another, or to compel any person against his will to perform personal services for another. The right of a person to sell his labor upon such terms as he

> deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it. * * * In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land." (174, 175)

Now, in contrast, however, with these cases, especially in contrast with *Lochner* v. *New York*, 198 U. S. 45, *supra*, is the case of *Muller* v. *Oregon*, 208 U. S. 412. In *Muller* v. *Oregon*, decided practically at the same time as *Adair* v. *United States*, and reported in the same volume, it was held that a statute of Oregon, which prescribed that no woman should be employed in a factory more than ten hours during any one day, was a valid enactment, because it was an enactment having a direct bearing upon the health of women, it being understood, as the court said, that women are not constitutionally able to stand the same amount of work, especially when standing, that men are able to stand, and, therefore, the statute was upheld as a valid exercise of the government's power to preserve the health of its people.

It seems to us it would be difficult to more clearly draw the contrast between what can be done and what cannot be done than by noting the case of *Muller* v. *Oregon*, upholding the law regulating the hours of labor of women, on the one hand, and the case of *Lochner* v. *New York*, denouncing the law attempting to regulate the hours of labor for bakers, on the other hand.

Now, what is insurance? It is nothing but a contract of indemnity, a mere pecuniary obligation; it has absolutely no relation to health or life or liberty or morality. It is simply a question of dollars and cents, a question of whether that which is paid on one side is an equivalent for that which is received on the other side, a mere question of sufficiency of consideration. It is freely admitted, no one disputes the proposition, that it is a matter in which there is no power of government to require men to make the contract at all; it is a matter in which no man is required to serve any other man; it is purely a matter of voluntary private contract in connection with property. If A says to a hundred men, if each one of you will pay me $1, I will insure the property of each of you against fire to the extent of $1,000 for a period of one year, that is insurance. And the simple question in this case is whether or not the government, the state, has the power to interfere in that matter of private contract and say the consideration of $1 as a premium for $1,000 for insurance is too great a compensation, it ought to be only 90 cents.

Reference is constantly made to the usury laws, fixing the amount to be paid for the use of money. In Mr. Justice Field's dissenting opinion in *Munn* v. *Illinois*, he calls attention to the fact, which is a mere matter of history, that at common laws it was not permitted at all to charge interest for the lending of money (see, also, *In re* Berger, 193 Mo. 16, and *Kreibohm* v. *Yansey*, 154 Mo. 67; *State ex rel.* v. *Associated Press*, 159 Mo. 410), and this is a principle which seems to have come down from the days of

Aristotle, who insisted that money was a mere medium of exchange; that it was not itself productive and that it was not right to make that productive which was by its very nature not productive. It seems also to have been thought by many that it was contrary to the law of God. But whatever may have been the original reason for the conception, it was the conception of our English forefathers that it was unlawful to charge interest for the use of money, and the usurer was considered an object of scorn. The right to charge interest was given by statute, which was thus an enabling or persuasive statute, and with the grant of this privilege came the limitation upon the privilege, to-wit, a limitation as to the extent to which interest might be charged. The interest statutes, therefore, were in their origin not statutes limiting a natural right, but they were statutes giving a privilege which had not theretofore existed and which at the same time limited the privilege thus given.

In this same connection stray laws, fixing the charge that a person can make for picking up a stray on the public road, and similar laws which in the timber states are found regulating the charge that may be made for saving a log that has broken loose from a boom, are mentioned. But the same history seems to attach to these laws that attaches to the interest laws, to-wit: that at common law a person who found a stray or a watch, or any other personal property, on the public road and took it in was not entitled to charge for it at all, and the right to do so is purely a statutory right, which, of course, may be limited.

West Branch L. Ex. v. *McCormick*, 1 Pa. Dist. Rep. 542.

In *Coffeyville V. B. & T. Co.* v. *Perry,* 69 Kas. 297, the Supreme Court of Kansas had under consideration a statute making it unlawful for an employer to discharge an employe for the reason that he belonged to a lawful labor organization. It was sought to justify this statute under the police power of the state. The court upon this question said:

> "Before approaching a discussion of the question let us exclude any notation that the act in question is a police regulation.
>
> It will be observed that it does not affect the public welfare, health, safety or morals of the community, or prevent the commission of any offense or other manifest evil.
>
> Where the object of the act cannot be traced to the accomplishment of some one of these purposes, it is not a police regulation. Besides, the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the constitution, under the guise of a police regulation."

This declaration of the limitations of the police power of the legislature, namely, that the legislature cannot, under the guise of a police regulation, impair or limit the exercise of constitutional rights, was affirmed in the quoted words by the Supreme Court of Kansas, in *Railway Company* v. *Brown,* 80 Kas. 312.

In *Mugler* v. *Kansas,* 123 U. S. 623, this court speaks of the limitation upon the police power when considering the constitutionality of the prohibitory law of Kansas. In the opinion of the court, written by Mr. Justice HARLAN, it is said:

> "It belongs to that department (the legislative) to exert what are known as the police powers of the state and to determine primarily

what measures are appropriate or needful for the protection of the public morals, the public health or the public safety.

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends has to be accepted as a legitimate exercise of the police powers of the state. There are of necessity limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, the courts must obey the constitution rather than the law-making department of the government, and must upon their own responsibility determine whether in any particular case these limits have been passed.

"'To what purpose,' it was said in *Marbury* v. *Madison*, 1 Cranch 137, 'are powers limited, and to what purpose is that limitation committed in writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if these limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.'

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry of whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety has no real or substantial relation to these objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

In this case, if it is determined by the court that the business of fire insurance is not a public em-

ployment, and is not affected with a public use within the meaning of that phrase as used in *Munn* v. *Illinois,* 94 U. S. 113, and that, therefore, the power of the state to legislate as to rates of premium does not exist, under the rule of that case, a statute regulating rates cannot be justified and upheld upon the plea that the enacting of the statute was within the police power of the state. That is, the police power of the state does not justify the enactment of an otherwise unconstitutional law.

IV.

The Kansas Rate Law of 1909 cannot be sustained as a condition precedent to the right of a foreign corporation to do business in the state.

While the state may exclude a foreign corporation because it refuses to obey an act which the corporation may consider unconstitutional, yet to make such an act an effective exclusion measure, the act must be framed on the exclusion theory, and this act is not framed upon any such theory but is in general terms, and the court will note particularly that it applies to domestic as well as to foreign corporations.

In the case of *American Surety Co.* v. *Shallenberger,* 183 Fed. 636, the question presented was the same as is presented here.

The legislature of Nebraska passed an act providing that the auditor of public accounts should fix a maximum rate to be charged by fidelity and

surety companies as rates of premiums upon their policies.

Upon the hearing Judge Munger held the statute, which is the same in substance as the Kansas rate statute, here under discussion, to be unconstitutional, and his reasoning upon the question as to whether it is an exclusion measure is so clear that we beg to quote briefly from his opinion, in which he says:

> "Coming to the real question in the case, viz., the validity of the act of the Legislature of 1909, it will be seen that the act applies, in express terms, to both foreign and domestic companies. Therefore the act cannot be sustained upon the doctrine that the state has the right to exclude foreign insurance companies from doing business in the state, as declared in *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535-542, 24 L. Ed. 148; *Security Mutual Life Ins. Co.* v. *Prewitt*, 202 U. S. 246-257, 26 Sup. Ct. 619, 50 L. Ed. 10."

Quoting from Mr. Justice Holmes' opinion in *Carroll* v. *Greenwich Insurance Co.*, 199 U. S. 401, Judge Munger continues:

> "The act is in general terms and hits all insurance companies. If it is invalid as to some it is invalid as to all. *United States* v. *Ju Toy*, 198 U. S. 253. That the requirements of the act might have been made conditions to foreign companies doing business in the state (*Fidelity Mutual Life Ins. Co.* v. *Mettler*, 185 U. S. 308; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28) is immaterial, since as we understand the statute, the Legislature did not attempt to reach the result in that way. A company lawfully doing business in the state is no more bound by a general unconstitutional enactment than a citizen of the state. *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452."

In *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, an act of the legislature of the State of Iowa, which commenced, "It shall be unlawful for two or more fire insurance companies doing business in this state to combine to fix rates," etc., was under consideration. One of the penalties imposed for a violation of the act was forfeiture of license to do business for one year.

Mr. Justice Holmes delivered the opinion of the court and held in the words quoted by Judge Munger that the act could not be sustained as an exclusion statute.

In *Aetna Fire Insurance Company* v. *Jones*, 78 S. C. 445; 13 L. R. A. N. S. 1147, the Supreme Court of South Carolina considered the constitutionality of the act imposing a tax upon "every fire insurance company, corporation or association doing business in any incorporated city or town of this state" for the purpose of accumulating a fund for relief of injured firemen and their families. By Section 5 the act gave to the comptroller general authority to revoke the license of any company which failed to pay the tax or any penalty imposed for the violation of any of the conditions of the act. It was contended in the support of the law that the imposition provided for was not a tax, but was one of the conditions upon which foreign insurance companies were permitted to do business in the state. Replying to this contention, the court said:

> "Such a contention we think cannot be sustained. In the first place, the act is general, applying both to domestic and foreign corporations. In the second place, the act itself does not purport to be conditional. It applies to 'ev-

> ery fire insurance company, corporation or association doing business in incorporated cities or towns in this state.' The participle 'doing' is important here as throwing light on the intention of the legislature. The word implies that the corporations are already in existence, and are carrying on business. The license has already issued. True, the act does provide that, under certain circumstances the certificate shall be revoked; but we regard this as merely a means for securing the collection of the imposition, and not as a condition subsequent. That the legislature might have imposed such a condition upon foreign corporations, as well as domestic corporations, it is not our duty here to decide. Suffice it to say that no such condition was imposed."

This same question arose in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, where it was contended that because the defendant in error was a foreign corporation doing business in Illinois it was bound to obey the statute law of that state, the implication being that a foreign corporation, because of the permission granted to it to do business in the state, could not urge the unconstitutionality of a local statute.

Meeting this contention, Mr. Justice HARLAN said (p. 558):

> "These matters are called to our attention as showing—as they undoubtedly do—that the Union Sewer Pipe Company, while doing business in Illinois, was subject to the statute of Illinois concerning trusts or combinations, and which, in terms, applies to both domestic and foreign corporations. But the question remains to be decided whether the statute is repugnant to the Constitution of the United States. If it be, then it is not law and cannot be applied for

the purpose of defeating the plaintiff's claims in these actions."

In *Lafayette Ins. Co.* v. *French,* 18 How. 404, the Supreme Court, speaking of the consent given by a state to a foreign corporation to do business within its borders, says:

> "This consent may be accompanied by such conditions as Iowa may think fit to impose, and these conditions must be deemed valid and effectual by other states and by this court, *provided they are not repugnant to the constitution and laws of the United States,* or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

In *Cargill* v. *Minnesota,* 180 U. S. 452, the Supreme Court, after holding that a state could legally require a foreign corporation owning an elevator in Minnesota to secure a license as required by law, discussed the duties and obligations imposed upon a foreign corporation which has been licensed by a state, and said:

> *"The acceptance of a license in whatever form will not impose upon licensee an obligation to respect or to comply with any provision of the statute, or with any regulations prescribed by the State Railroad and Warehouse Commission that are repugnant to the Constitution of the United States.*
>
> *A license will give the defendant only authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed by the commission."*

In *National Council U. A. M.* v. *State Council,* 203

U. S. 151, the court says, citing *Carroll* v. *Greenwich Insurance Co., supra*:

> "*An unconstitutional law no more binds a foreign corporation than it binds others.*"

In the recent decision of the Supreme Court in *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, the court, referring to the fee or tax imposed by the Bush act upon foreign corporations, and with special reference to the claimed right of the state to impose such conditions as it desires upon the right of such a corporation to do business in the state, says (page 35):

> "Can such a regulation be deemed constitutional any more than one requiring the company, as a condition of its doing an intrastate business, that it should surrender its right, for instance, to invoke the protection of the constitution when it is proposed to deprive it of its property without due process of law, or to deny it the equal protection of the laws?"

And, in answering in the negative the question thus put, cites:

> *Lafayette Ins. Co.* v. *French,* 18 How. 404;
> *S. P. Co.* v. *Denton,* 146 U. S. 202,

and the other familiar cases which have held that "no conditions may be imposed by the state which are repugnant to the constitution and laws of the United States," and reviews at length and distinguishes *Ins. Co.* v. *Prewitt,* 202 U. S. 246 (page 45).

The Bush act was held repugnant to the constitution of the United States so far as the Western Union Telegraph Company was concerned, because the latter corporation was engaged in interstate

commerce, upon which the state has no power to place limitations, burdens or restrictions.

The Kansas Rate Act is unconstitutional and void because under the limitations imposed by the Fourteenth Amendment to the Constitution of the United States, the state has no power to regulate as to the rates and charges of a private business. It has no more power to impose obedience to an unconstitutional enactment upon a foreign corporation than it has to compel like obedience by a domestic corporation, or upon a private citizen.

The act of the legislature of the State of Kansas of 1909 is a general law applicable to *all* fire insurance companies doing business in the State of Kansas, both domestic and foreign. While one of the penalties for violation of its provisions is the revocation of license to do business, the law is not drawn upon the theory that compliance with its conditions is a condition precedent to the right of a foreign company to do business in the state, and, under the authorities above cited, cannot be sustained as an exclusion statute.

If the act is repugnant to the Constitution of the United States, failure to comply with its provisions cannot be made a lawful basis for the refusal by the Superintendent of Insurance to issue a license to foreign companies, or to revoke those already issued. As was said in *Cargill Co.* v. *Minnesota, supra*:

> "If the Commission refused to grant a license, or if it sought to revoke one granted because the applicant in the one case, or the licensee in the other, refused to comply with

> the statutory provisions, or with rules or regulations inconsistent with the constitution of the United States, the rights of the applicant or the licensee could be protected and enforced by appropriate judicial proceedings."

Upon the authority of the above cited cases, the proposition may be laid down that a foreign corporation is no more bound by an unconstitutional act than a domestic corporation.

In *Waters Pierce Oil Co.* v. *Texas,* 177 U. S. 28, Section 4 of the Texas statute specifically provided that every *foreign corporation* violating the provisions of the act should forfeit its right to do business in the state.

In *Security Mutual Life Ins. Co.* v. *Prewitt,* 202 U. S. 246, Section 631, of the Kentucky statutes specifically provided that upon a violation of the act *by a foreign insurance company* it should be the duty of the commissioner to revoke all authority of such company and its agents to do business in the state.

In *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557, the court held that it was bound by the construction of the act in question (Valued Policy Law) by the Supreme Court of the State of Missouri, in so far as said court had held that such act was an exclusion statute and compliance therewith a condition upon the right of *foreign corporations* to do business in the state.

We trust the court will not understand from the preceding that we concede the right of a state to fix the price at which insurance shall be sold, even as an exclusion measure. In the cases cited under the last above heading the questions involved are

the right of the companies to combine to fix rates, the right of the state to tax the companies, the right of a company to do business without securing a license, the right of a state to require a valued policy law, etc., all of which might properly be held to come within the police power of the state over corporations. But we are not by any means admitting that where the act is *clearly unconstitutional,* as we insist this act is, that the state has the constitutional right to pass it, even as an exclusion statute.

V.

The law cannot be sustained on the ground that it is within the power of the legislature of a state to impose such conditions as it likes upon corporations which derive their right to exist from the state.

The reasoning and the authorities which we have presented under the last preceding heading we think apply equally to this proposition.

If an act of the legislature is in conflict with the Constitution of the United States, then that law cannot be sustained whatever it may be.

In other words, the power of the legislature is limited by the Constitution of the State and by the Constitution of the United States, and if such legislation is in conflict with either, then the legislation must fail.

Upon this question the Court of Appeals of New York, in *People* v. *Budd,* 117 N. Y. 1; 5 L. R. A. 559, in considering the legislative power to regulate ele-

vator charges, holds that the power to regulate does not depend upon the fact that those affected by the legislation are corporations created by the state, and says:

> "The state in constituting a corporation may prescribe or limit its powers and reserve such control as it sees fit, and the body accepting the charter takes it subject to such limitations and restrictions, and is bound by them. * * * But when a corporation is created it has the same rights and the same duties, within the scope marked out for its action, that a natural person has. *Its property is secured to it by the same constitutional guaranties, and in the management of its property and business is subject to regulation by the legislature to the same extent only as natural persons, except as the power may be extended by its charter. The mere fact of a corporate character does not extend the power of legislative regulation.*"

In *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 684, Mr. Justice PECKHAM, discussing the question of railroad rate regulation by the state, says:

> "*The power to enact legislation of this character cannot be founded upon the mere fact that the thing affected is a corporation.* Even when the legislature has power to alter, amend or repeal the charter thereof, the power to alter or amend does not extend to taking property of the corporation either by confiscation or entry by other means. The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers, or others exercising a calling and using their property in the manner in which the public have an interest."

In *State, ex rel., Star Publishing Co.* v. *Associated Press*, 159 Mo. 410; 51 L. R. A. 151, Judge SHER-

WOOD, in his able opinion, elsewhere referred to and quoted from, considers the question of whether the fact that the Associated Press conducted its business under a corporate organization gave to the state any right to regulate which would not have existed had the same business been conducted by an individual.

After holding that the controlling element in the Munn case was that of monopoly and that the monopolistic feature was absent in the case of the Associated Press, because it was in direct competition with others in the same business, and that it had received no special or exclusive rights or privileges from the state, he continues:

> "Nor has the respondent acquired any additional right by reason of its incorporation, to that it possessed before. Everyone is at liberty to gather news; and the fact that one has greater facilities or finances for gathering and transmitting news, or that the business has grown into one of great magnitude, widespread in its ramifications, *or that mere incorporation has been granted a company organized for the purpose of gathering news, does not, and cannot of itself, give the state the right to regulate what before incorporation was but a natural right.*
>
> "Were the rule otherwise than as stated, the effect would be to deprive a person of a right to pursue any lawful calling, or to contract where and with whomsoever and at what price he will. The right thus to contract cannot be interfered with; it is part and parcel of personal liberty, and therefore under the protection of sec. 30, art. 2 of our state Constitution and of the 14th Amendment of the Constitution of the United States, as heretofore quoted."

The reasoning of the above cited cases holds directly to the proposition that if the attempted regu-

lation of rates of premium for fire insurance would be unconstitutional and void in the case of a private individual, such attempted regulation is equally void when the entities affected are corporations created by the state attempting to enforce such regulation. That is, the mere fact that the act in question affects only "fire insurance companies" and does not affect individuals, partnerships or incorporated associations, does not in any way help to sustain its validity.

The fact that a state has the right to impose upon corporations chartered by it certain conditions or restrictions as to the method in which it conducts its business does not give to the state the right to prescribe the rates at which it shall supply the public, unless it would have the same right over private individuals engaged in the same line of business.

In this case, if the regulation of rates of fire insurance by the state would be invalid as to individuals, partnerships and unincorporated associations, it is equally invalid as to corporations. The question, therefore, comes back to the doctrine of *Munn* v. *Illinois*, which not only held that the state could regulate the charges of persons and corporations engaged in a public business, but also by necessary implication, that the right did not exist as respects a private business.

In order to sustain this law as a legal and valid exercise of legislative power, it must be determined, in the first instance, that the business of fire insurance is a public business, and the fact that the law applies only to corporations organized under the authority of the law of the State of Kansas, or ad-

mitted to do business within its borders does not, in the absence of a finding of a public use, in any way help the situation from the standpoint of the state.

VI.

The business of fire insurance is not a monopoly.

We do not anticipate that any claim will be made that fire insurance is a monopoly, but if so, a complete answer to such claim might be found in the fact that the bill of complaint in this case alleges in express terms that there is no monopoly, either legal or actual, in the fire insurance business (see Rec., 12), and the demurrer to this bill admits the truth of this allegation, and, therefore, upon the record it cannot be challenged here.

However, it is not a fact that there is a monopoly either legal or actual in the fire insurance business. On the contrary, a monopoly in this business is absolutely impossible.

At the time this suit was brought in 1911, there were 325 domestic and foreign stock companies doing business in the United States ("Insurance and the State", Gephart, 95), and this number has not diminished since that date. In 1911 there were 268 mutual companies doing business in the United States without including what are known as town mutuals and farmers' mutuals, both of which do a large business in the State of Kansas. In addition to the above, there are a large number of what are known as inter-insurance associations doing busi-

ness all over the United States; the latter being associations organized by merchants, druggists, lumbermen, packing houses, and those engaged in other kinds of business, by which they organize to issue to each other policies of insurance at actual cost, plus a small percentage to pay expenses. In addition, also, to those above mentioned are what is known as Lloyds; many organized in England and doing an immense business in this country, and others organized in the United States, and also writing large amounts of business. Under Lloyds policies individuals subscribe for a certain amount of insurance under each policy, and in case of a $10,000 policy, perhaps fifty individuals will subscribe for $200 each of the insurance covered by the policy.

It may also be stated as a fact that in most of the states there is Grange insurance and any individual may write insurance as he sees fit to do, and this is true with reference to the laws of Kansas.

The court will, therefore, please note from the above that fire insurance not only is not a monopoly, but in the very nature of things it cannot be a monopoly either legal or actual.

Any property owner in the United States has the privilege of applying to anyone of 750 or 800 different fire insurance companies or associations for his insurance, and in such a case a monopoly is absolutely impossible.

In the case of *Herriman* v. *Menzies*, 115 Cal. 16, 35 L. R. A. 318, a monopoly is defined as follows:

> "A monopoly exists where all, or nearly all, of an article of trade or commerce within a community or district, is brought within the

> hands of one man or set of men, as to practically bring the handling or production of the commodity or thing within single control to the exclusion of competition or free traffic therein."

In the case of *U. S.* v. *American Tobacco Co.*, 164 Fed. 700, it is stated that:

> "A monopoly in the modern sense is created when as a result of efforts to that end previously created businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations, acting together that they have power to practically control the prices of commodities and thus practically suppress competition."

It may be said without fear of successful contradiction that the competition existing today amongst fire insurance companies, and which existed in 1911, is as fierce and relentless as the competition in any other business in the world. Indeed, it has become a survival of the fittest, and with the millions of dollars taken in in premiums it is exceedingly doubtful whether during the three years from 1911 to 1913, inclusive, any insurance company has made a profit upon its underwriting business, and in view of the fact of the immense number of companies, individuals, associations, mutuals and Lloyds transacting business in the United States, of all kinds, it is impossible that a monopoly should or could exist.

At the close of 1911 there were 148 fire and fire marine insurance companies in the hands of receivers in the United States ("Insurance and the State", Gephart 115), and it may safely be said that number is exceeded at this time and the competition is

now so fierce that forty-seven fire companies have retired from business within the past three months.

These facts, we submit, show that a monopoly is impossible—there is no monopoly.

VII.

The business of fire insurance is not a proper function of government, nor does it receive special privileges from the state.

Upon the first proposition we beg to call the court's attention to the fact that—

Under limited constitutions strictly defining the powers of government, as are the Constitutions of the United States and the several states, the business of insurance cannot be carried on by the government. The reasons why this is so cannot be better stated than in the language of the Supreme Court of Ohio in *State of Ohio ex rel.* v. *Guilbert,* 56 Ohio St. 575, where the question of a title insurance provision of a "Torrens" land registration act was under consideration. That court said:

> "Considering the purpose for which government is instituted and the high conception of individual right which prevailed at the time of the adoption of the constitution it would be strange if authority had been conferred upon the state to carry on the business of an insurer of private titles. No such authority is implied in any of the terms of the Constitution. It is not implied in any of the enumerated purposes for which government is formed. It is entirely foreign to those purposes. The legislature may by law authorize the organization of corpora-

> tions for the purpose of carrying on the business of insurance, but this grant of power is rather a negation of its authority to conduct such business itself. The functions of the state are governmental only. Its powers are embraced within the three familiar divisions of legislative, judicial and executive. He who affirms the existence of the power in question must be able to find it embraced in one of these divisions; and since the insuring of titles does not essentially differ from any other insurance, nor indeed from any other business or occupation, he must find authority in whose exercise the state may become the competitor of the citizens in every vocation."

Upon an allied question—the right of the state to authorize municipalities to carry on the business of selling coal and wood, the Supreme Judicial Court of Massachusetts in a requested opinion as to the validity of a proposed act, said:

> "We know of nothing in the history of the adoption of the constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of government which was to be established. There are nowhere in the constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as at that time when the constitution was adopted was usually bought and sold by individuals and with which individuals were able to supply the community, *no matter how essential the business might be to the welfare of the inhabitants.* The object of the constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth

to undertake what had usually been left to the private enterprise of individuals."

Opinion of the Justices, 155 Mass. 598.

In the above case the court distinguishes the business of buying and selling ordinary commodities and that of selling gas and electricity, mainly upon the ground that in the latter special privileges are granted for the proper conduct of the business such as the use of the streets for poles, wires and pipes.

In a subsequent opinion involving the same question, that court said:

"It is established that under our Constitution private property cannot be taken from its owner except for a public use. This is equally true whether the property is a dwelling house taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use.

Until within a few years it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise, with a view either to the profit that could be made through the income to be derived from the business, or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collect-

ively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coal yard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for if the coal yard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessaries of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employes in stores and shops conducted by the public authorities."

Opinion of Justices, 182 Mass. 605.

Fire insurance companies receive no special privileges from the state.

The business of fire insurance in the State of Kansas is free to all, subject only to the regulating statutes of the state. Individuals engaged in the business of fire insurance enjoy no right or privilege which is not enjoy to an equal degree by those engaged in other lines of business, nor is the situation changed in the case of fire insurance companies. Such companies receive no special privileges not granted to other corporations.

In *Aetna Life Ins. Co.* v. *Coulter*, 115 Ky. 787, the Court of Appeals of that state, referring to insurance companies in general said:

> "They exercise no special or exclusive privilege not allowed by law to natural persons. At common law private persons can make contracts of insurance, and this common law right is recognized by Section 641, Kentucky Statutes of 1899."

The same may be said in respect to the recognition of the right of natural persons to make contracts of insurance under the Kansas law.

Section 4091 of the General Statutes of Kansas, 1909, which is the concluding section of the General Insurance Law, provides:

> "The provisions of this act shall apply to individuals and partners and to all companies and associations, whether incorporated or not, hereafter engaged in the business of insurance."

VIII.

A general public interest is not equivalent to a public use.

That that which is of public interest and benefit is not necessarily a *public use* has been frequently pointed out in the cases heretofore cited. This question was specially considered by the Court of Appeals of New York in *Matter of Niagara Falls & W. R. Co.*, 108 N. Y. 375. Judge ANDREWS, speaking for the court, there says (p. 385):

> "The expressions *public interest* and *public use* are not synonymous. The establishment of furnaces, mills, manufactures, the building of churches and hotels and other similar enterprises are more or less matters of public concern and promote in a general sense the public welfare. But they lie without the domain of pub-

lic uses for which private ownership may be displaced by compulsory proceedings."

Mr. Justice PECKHAM, when sitting as a judge of the same court, expressed a similar opinion in *Matter of Mayor, etc., of New York*, 135 N. Y. 253. On page 259 he says:

> "The learned counsel for the owners cites many cases to show that the use to which the property is to be applied must be a public use. The question of whether or not it be such an use is a judicial one. There is, I think, unquestionably a distinction between the use which is public and the interest which is public, and where there is simply a public interest as distinguished from a public use, the right of eminent domain cannot be exercised. The interest may be of a public nature when the use may tend incidentally to the benefit of the public in some collateral way. In such case the right to take property *in invitum* does not exist."

See, also:

> Lewis on Eminent Domain (2d Ed.), Sec. 165.

The argument, used by Judge Peckham, is equally applicable to the case of legislative regulation of rates and charges. It does exist where the business to be regulated is affected with a public use, or where the property has been devoted to a public use. Where, however, a public interest alone exists, as distinguished from a public use, where the public interest or public benefit is merely incidental or collateral, then the right of regulation does not exist. Such is the nature of the public interest in the business of fire insurance. It is collateral and incidental, and does not exist in the business itself.

To the same effect is *Lowell* v. *Boston,* 111 Mass. 454. The question there presented was the constitutionality of an Act authorizing the City of Boston to issue bonds and lend the proceeds on mortgage to the owners of land, the buildings upon which were burned down by the great fire of 1872.

In holding this Act to be unconstitutional, on the ground that the purpose was private and not public, the court said:

> "The power to levy taxes is founded on the right, duty and responsibility to maintain and administer all the governmental functions of the State, and to provide for the public welfare. To justify any exercise of the power requires that the expenditure which it is intended to meet shall be for some public service, or some object which concerns the public welfare. The promotion of the interests of individuals, either in respect of property or business, although it may result incidentally in the advancement of the public welfare, is, in its essential character, a private and not a public object. However certain and great the resulting good to the general public, it does not, by reason of its comparative importance, cease to be incidental. The incidental advantage to the public or to the State, which results from the promotion of private interests, and the prosperity of private enterprises or business, does not justify their aid by the use of public money raised by taxation, or for which taxation may become necessary. It is the essential character of the direct object of the expenditure which must determine its validity, as justifying a tax, and not the magnitude of the interests to be affected, nor to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion."

And upon the question of the power of the govern-

ment to take private property, the court further said:

> "The power of the government, thus constituted, to affect the individual in his private rights of property, whether by exacting contributions to the general means, or by sequestration of specific property, is confined, by obvious implication as well as by express terms, to purposes and objects alone which the government was established to promote, to-wit, public uses and public service. This power, when exercised in one form, is taxation; in the other, is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to-wit, the necessities of organized society; and in the end by which alone the exercise of either can be justified, to-wit, some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each. An appropriation of money raised by taxation, or of property taken by right of eminent domain, by way of gift to an individual for his own private uses exclusively, would clearly be an excess of legislative power. The distinction between this and its appropriation for the construction of a highway, is marked and obvious. It is independent of all considerations of resulting advantage. The individual, by reason of his capacity, enterprise or situation, might be enabled to employ the money or property thus conferred upon him in such a manner as to furnish employment to great numbers of the community, to give a needed impulse to business of various

kinds, and thus promote the general prosperity and welfare. In this view, it might be shown to be for the public good to take from the unenterprising and thriftless their unemployed capital and entrust it to others who will use it to better advantage for the interests of the community. But it needs no argument to show that such an arbitrary exercise of power would be a violation of the constitutional rights of those from whom the money or property was taken, and an unjustifiable usurpation."

IX.

The power to regulate rates and charges is simply the power to take private property for public use.

When the state prescribes or limits the rates or charges in any particular business, it to that extent deprives those engaged in that business of the right to contract. The right to contract is a property right—is property itself.

The right of a government to take private property is a limited right. Upon this power of government Chancellor KENT says:

> "Private property must in many instances yield to the general interest. The right of eminent domain or inherent sovereign power gives to the legislator the control of private property *for public uses only.*"
>
> 2 Kent's Commentaries, 333.

In the Charles River Bridge case, 11 Peters 420, Mr. Justice STORY defines Eminent Domain in these words (p. 641):

> "The right of eminent domain is usually un-

> derstood to be the ultimate right of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty to *public purposes.*"

This inherent sovereign power is exercised in a number of different ways:

(*a*) By taxation;
(*b*) By taking private property by the technical action of "Eminent Domain";
(*c*) Under the police power;
(*d*) By the regulation of rates and charges.

These various methods of exercising this power, though derived from the same source, have developed along different lines and are subject to somewhat different rules and are independent of each other. The exercise of this power by whatever mode is subject to the limitation of the original power. The taking must be for public use.

Judge TOPLEY, of the Supreme Judicial Court of Maine, in Opinion of the Justices, 58 Me. 590, after quoting the above definitions, and referring specially to the right to tax, says (page 616):

> "Some distinction has been sought to be made between the right to seize specific articles of property for a public use and obtaining money through the ordinary forms of taxation, and we sometimes hear of a justification under the taxing power of the government. I am unable to perceive the soundness of the distinction. I understand that the right and power of taxation rests upon the right as described by Judge Story, 'of the sovereign power to appropriate not only the public property, but the private property of all citizens within the territorial sovereignty, to public purposes.' *The difference is in the mode of taking only.*"

In *Lowell* v. *Boston*, 111 Mass. 454, heretofore quoted from, referring to the power of government to take private property, it is said:

> "This power when exercised in one form, is taxation; in the other is designated as the right of eminent domain. The two are diverse in respect of the occasion and mode of exercise, but identical in their source, to-wit: the necessities of organized society; and in the end by which alone the exercise of either can be justified, to-wit: some public service or use. It is due to their identity in these respects that the two powers, otherwise so unlike, are associated together in the same article. So far as it concerns the question what constitutes public use or service that will justify the exercise of these sovereign powers over private rights of property, which is the main question now to be solved, this identity renders it unnecessary to distinguish between the two forms of exercise, as the same tests must apply to and control in each."

We confidently assert that the power to regulate rates and charges is identical as to its source with those of taxation and the right of eminent domain. In determining the question of what constitutes public use that will justify the fixing of rates and charges by the state the same tests must apply and control.

With equal confidence we assert that the power to regulate rates and charges is no more to be attributed to the police power than is the power of taxation or the exercise of the right of eminent domain.

The House of Representatives of the Commonwealth of Massachusetts requested the opinion of the justices of the Supreme Judicial Court upon the con-

stitutional power of the legislature to enact a weekly payment law which would be applicable to private individuals and partnerships as well as corporations. The court refers to the broad power granted to the Massachusetts legislature by its constitution, and to certain decisions of the Supreme Judicial Court upon questions allied to that submitted to it and says:

> "The decisions of the various courts of this country upon the authority of the legislature of a state to prescribe rates for transportation by railroad companies and, in some instances, for the use of elevators, have proceeded on the ground that these were *public employments, and it is implied in all, or nearly all, of these decisions that the legislature could not constitutionally prescribe the rates of compensation to be paid for services or for the use of the property in exclusively private employments.*
>
> It is manifest, however, from the examples we have given, that the regulation of contracts by statute, not amounting to a determination of rates or prices, has not been confined to public employments or to business which may be said to be affected with a distinct public interest. The legislation on this subject relates to a great variety of contracts and has been passed, some of it to promote the public health or the public morals or the public convenience; some of it for the protection of individuals against fraud, and some of it for the protection of classes of individuals against unfair or unconscionable dealing."
>
> Opinion of the Justices, 163 Mass. 589.

The difference between the power to regulate rates and charges and the constitutional limitation upon the exercise of that power, and the power to regulate as to matters affecting the public health, morals, safety and convenience, pointed out in the above

quoted opinion of one of the most eminent courts of this country, is the precise difference between the case here presented and the innumerable cases upholding various statutory regulations under the police power of the state.

The taking of private property by taxation is not an exercise of the "police power," but is an independent development of the general power of government. A condition precedent to the legality of a tax is the public purpose for which it is levied, and the general welfare of the people or of the community has never been held to be the equivalent of public purpose. The taking of property by "Eminent Domain" is distinct and separate from the taking by taxation and is not an exercise of the police power. Here also the condition precedent to the taking is that the property is to be devoted to a public use, and many cases heretofore referred to hold that public interest or the general welfare of the people is not sufficient to justify the taking, but that there must be a public use in truth and in fact. The fixing of rates and charges has never been ascribed to the power to tax or the power to take property by "Eminent Domain," but is subject to a like condition precedent; that is, the business so regulate must be a public business. The exercise of the police power, on the contrary, is proper in the interest of the health, safety, morality and general welfare of the people, terms indefinite in meaning and capable of expansion to meet the ideas of legislators and courts. The only point of connection between the power to fix rates and charges and the police power is that they are derived from the same source and are sub-

ject to the same general limitation. It has never been held that the power to tax or the power to take private property by "Eminent Domain" could be exercised for the general welfare, but it must be for a public purpose or a public use and the same rule should be applied to the power to fix rates and charges. In fact, in no case in which the power to fix rates and charges has been upheld has it been sustained upon the indefinite and uncertain police power of the state, but upon the finding by the court that the business sought to be regulated was a public business.

In *Dodge* v. *Mission Township*, 107 Fed. 827, a case in which it was attempted to sustain the validity of bonds issued under the authority of an act of the legislature of the State of Kansas, in aid of a sorghum sugar and syrup factory, and in which it was determined that the purpose in aid of which the bonds were issued was a *private* and not a *public* one, and that therefore no tax could be legally levied for the payment, Judge SANBORN, delivering the opinion of the United States Circuit Court of Appeals, said:

> "It is a fundamental principle of a republican form of government that no man shall be involuntarily deprived of his life, liberty or property without due process of law. The prohibition of such a deprivation by the states is found in the Fourteenth Amendment of the Constitution of the United States. But it lies deeper, and limits and conditions every grant of legislative, executive, or judicial authority. The proposition was announced in the early history of the Republic and it has been constantly affirmed."
>
> "The Supreme Court said in *Calder* v. *Bull*, 3 Dall. 386-388. A law that punishes a citizen for an innocent action, or, in other words, for

an act which, when done, was in violation of no existing law; *a law that destroys or impairs the lawful private contracts of citizens;* a law that makes a man a judge in his own cause; *or a law that takes property from A and gives it to B*— it is against all reason and justice for a people to intrust a legislatufe with such powers, and therefore it cannot be presumed that they have done it."

"*A legislative act which takes, or undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect.* The legislative power of taxation and power of eminent domain are alike limited to the exercise thereof for public objects, and they cannot be successfully prostituted for private purposes."

Mr. Justice GREY, in *Cole* v. *City of LaGrange*, 113 U. S. 1, after laying down the general proposition that

"The grant of legislative power in the constitution of a state does not enable the legislature, in the exercise either of the right of eminent domain or of the right of taxation, to take private property, without the owner's consent, for any but a public object, 'and that' these limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject,"

says:

"So far as respects the *use*, the taking of private property by taxation is subject to the same limit as the taking by the right of eminent

> domain. Each is the taking by the state for the public use, and not to promote private ends."

The argument is equally appropriate to the case of the regulation of rates and charges. The power to so regulate is but the power inherent in sovereignty to take private property for public use.

In *Munn* v. *Illinois*, the chief justice, as a preliminary to the argument that the business there in question was a public business subject to regulation as to rates and charges by the state, places the power to regulate, the public character of the business being established, in the inherent right of government over the property of the citizen. The court there properly said that this inherent right of government was the *source* of the police power. That the right to regulate rates and charges cannot be justified under the "police power" as that term is ordinarily used has been heretofore commented upon.

It is submitted that the difference in the taking of corporeal property in the exercise of the power of "eminent domain," the money of the citizen by taxation, the right to contract of the citizen by the regulation of the rates and charges of the business in which he is engaged, is in the manner of the taking only—the public use—the public purpose which must exist as a condition precedent is the same in all. The public use for which corporeal property may be taken, the public purpose which justifies taxation, and the public character of the business which authorizes state regulation of rates and charges, are in their essential characteristics the same.

Before the courts will permit the power of "em-

inent domain'' to be exercised, it must be established that the purpose for which private property is to be taken is a public use. As used with reference to eminnent domain, the term ''public use'' is a term of limitation, that is, the power of eminent domain cannot be exercised to the extent of taking private property, even though just compensation be paid therefor, unless the purpose of the taking is a public use.

No tax can be legally levied save for a public purpose, and the existence of a public purpose is a limitation upon, a condition precedent to, the exercise by the state of the taxing power.

So the phrase ''affected with a public use'' as used in *Munn* v. *Illinois*, is also a term of limitation, for the reason that the legislative power to regulate rates and charges exists only in the case of property affected with a public use. The public use—the public purpose—in the first mentioned cases, or the ''property affected with a public use,'' in the latter, being absent, the power to take and the power to regulate are alike wanting.

In this case it is most earnestly contended on behalf of appellant that the regulation of rates and charges is to be ascribed to the inherent power of government to take private property for public use. That is the exercise of a power above and beyond the police power—that it is no more within the police power than is the taking of private property by taxation or by the exercise of the power of ''eminent domain.''

But if the court is of opinion, treating certain expressions in *Munn* v. *Illinois*, as authoritative and

conclusive upon this point, that the legislature in regulating rates and charges is exercising the police power of the state, then it is submitted that the constitutional limitation upon that power forbids its exercise in the case of a private business. The state cannot justify the taking of private property, contrary to the mandates of the national constitution, by calling the power under which the property is taken the "police power" or by giving it any other name.

In *Munn* v. *Illinois*, as heretofore pointed out, the court recognized that the right to regulate rates and charges rested ultimately in the dominant right of government over all of the property of the citizen, and found it necessary to determine primarily that the business of elevating grain in Chicago was a *public business* before it determined that the act of the legislature of the State of Illinois regulating the charges in that business was legal and constitutional. In other words, the court recognized that if the business of Munn & Scott was a *private business* the right to regulate that business would not exist in the state.

So here, call the right to regulate as to rates and charges the police power—the inherent power of sovereignty, or what you will, there is a constitutional limitation upon the exercise of that power—the existence of a *public use*.

The attempt to justify the act of the legislature of the State of Kansas regulating the rates of premium for fire insurance under the claim of the exercise of police power can not be successful unless this court decides that the business of fire insurance is a public business.

Review of Decisions.

In the case of *Munn* v. *Illinois*, 94 U. S. 113, this court laid down the rule that when property has become "affected with a public use" the public, *i. e.*, the state, has the right to regulate that use.

While the doctrine of *Munn* v. *Illinois* was not adopted without strenuous dissent, in that and in succeeding cases involving the same question, it has now become an established principle in our law. The fundamental question, therefore, to be determined in this case is whether or not fire insurance is a business "affected with a public use" within the meaning of that phrase as used in the Munn case and in cases following that decision. If this question be decided in the affirmative it would follow that the state could regulate the rate of premium for fire insurance by an act properly framed and free from constitutional objections. If answered in the negative then every act passed with that purpose in view, however perfect in its detail, would be unconstitutional and void.

In order to determine whether or not fire insurance is "affected with a public use," within the meaning of the Munn case, it is necessary to analyze and review that case and also the cases in this court and in the state courts which have followed that decision, and to discover if possible the test by which a court may determine whether any particular business is or is not so "affected with a public use."

In *Munn* v. *Illinois*, the question before this court was the constitutionality of an act of the legislature

of the State of Illinois fixing the maximum charges for the storage of grain in warehouses in Chicago and elsewhere in said state "in which grain is stored in bulk, in which the grain of different owners is mixed, or in which grain is stored in such a manner that the identity of the different lots or parcels can not be accurately preserved." It was contended that said act was repugnant to that part of the Fourteenth Amendment to the Constitution of the United States, which provided that "no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The opinion of the court was delivered by Chief Justice WAITE, and in the opinion he says:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence and effect to the community at large. When therefore one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use and must submit to the control by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use he must submit to the control."

The above quotation is the foundation in our law of the doctrine that the state has the power to control a business affected with a public use. The court then considered the particular business mentioned in the Illinois act and decided that the storing of grain in the warehouses of Chicago, in which the grain of others was stored for profit, was a business "affected with a public use," on the ground

that such warehouses had a practical monopoly of the storage of grain raised in the Northwest and in course of shipment to the east, *and on the further ground that such warehouses were an adjunct to transportation and intimately associated with the common carriers in the business of transporting the grain from the place of its origin to the seaboard.*

Surely, the service of an elevator to transfer grain from a car to a boat, or from a boat to cars, is as much a part of the transportation as the hauling of the grain from one point to another.

The case of *People of the State of New York* v. *Budd*, 117 N. Y. 11, decided by the Court of Appeals of New York, involved the constitutionality of a statute of New York which fixed the maximum charge for receiving, weighing and discharging grain into and from elevators, and for trimming and shoveling grain to the leg of the elevator, and giving a civil remedy to any person injured by a violation of the act, and it was decided, following *Munn* v. *Illinois, supra,* that under the facts shown in the case the elevating of grain *was a practical monopoly* and *that it was an adjunct of transportation,* and that, therefore, it was a business "affected with a public use" and could be regulated, as to charges exacted by the state.

The same case on writ of error came before this court in *Budd* v. *New York,* 143 U. S. 517, where the doctrine of *Munn* v. *Illinois* was affirmed, and the New York statute sustained upon the specific proposition *that the business of elevating grain is analogous to that of a common carrier,* and that it appeared from the facts of the particular case that the

business of the passage of grain to the City of New York and other places on the seaboard would, without the use of elevators, be practically impossible.

In *Brass* v. *North Dakota,* 153 U. S. 391, the Supreme Court again upheld the doctrine of *Munn* v. Illinois, that public grain warehouses and elevators are so affected with a public use that the state may control the rate of charges, and extended the doctrine to the case of a country elevator in which no monopolistic features were present.

The case arose on a petition filed in the District Court of Rumsey County, North Dakota, *for an alternative writ of mandamus to compel Brass, the owner of a public elevator, to receive grain in store at the rates fixed by an act of the State of North Dakota,* and was brought to this court by a writ of error from the Supreme Court of North Dakota. The opinion of the court was written by Mr. Justice Shiras and simply extends the doctrine of *Munn* v. *Illinois* and *Budd* v. *New York* to cover the facts of the particular case, and held that the public had the right to demand the service because the business was a public business.

It is to be noted that in all of the above cited cases dissenting opinions were filed, in the Munn case by Justices Field and Strong, in the Budd case by Justices Brewer, Field and Brown, and in the Brass case by Justices Brewer, Field, Jackson and White.

The dissenting opinion of Mr. Justice Field in *Munn* v. *Illinois* is a general review of the whole question, citing the various cases in which state reg-

ulation of rates had theretofore been upheld, and expresses the opinion that the regulation of rates by the state is only permissible in cases where the business in question received from the state some special privilege, or where the business is a business which is a proper function of government.

In all of these cases the business conducted by the respective parties was of such a character that they were *bound to serve whosoever should demand service,* that a refusal to serve could be compelled by *mandamus,* as in the Brass case, or damages for such refusal could have been recovered in a court of law.

Following the case of *Munn* v. *Illinois,* and at the same term the so-called Granger cases were decided in which it was held that the business of a common carrier was affected with a public use, and that the state had the power to regulate the charges of common carriers.

The case of the common carrier, based, as it is, upon the fact that the business of a common carrier is a proper function of government, that the common carrier receives from the state special privileges such as the right of "eminent domain," and that the service of a common carrier *may be demanded by the public as a matter of right* is unquestionably subject to state rate regulation, and it seems unnecessary to further refer to any common carrier cases.

In Spring Valley Water Works v. *Schottler,* 110 U. S. 347, the doctrine of *Munn* v. *Illinois* was extended to cover the case of a public water works company, and the decision written by Chief Justice

Waite is based specifically upon the proposition that the water company in the particular case enjoyed *a virtual monopoly* of the sale of water. In addition it is to be noted that by the California statute water companies were empowered to acquire lands and water by condemnation, and also to acquire rights in public streets and roads for the laying of their pipes. The plaintiff in error in this case, the Spring Valley Water Works, was conducting a business of such a character that the public could demand service from it as a matter of right, compel such service by *mandamus*, or secure in a court of law damages for a refusal to serve.

In addition to the many cases supporting the right of state regulation in the case of railroad companies, the same doctrine, and for the same reason, has been extended to cover the business of street railways, of turnpike roads, telegraph companies and telephone companies, the business of the latter two being held to be analogous to that of the common carrier.

The doctrine of *Spring Valley Water Works* v. *Schottler, supra,* has been extended to cover the case of companies supplying gas, both natural and artificial, and to other cases of the supplying of water for municipal or domestic purposes, and also to the supplying of water for irrigating purposes.

In *State of Maine* v. *Edwards,* 86 Maine 102, 25 L. R. A. 505, the doctrine of *Munn* v. *Illinois* was applied to the case of a public grist mill, and the statute of the State of Maine limiting the toll which may be taken by a public grist mill operated by

water power was sustained as constitutional. Discussing the question of public use, the court says:

> "It is conceded by all authorities that the public use of property by the individual is within the scope of legislative control, and it matters not whether the use be authorized by express statute or dedicated by the individual proprietor. If it be a public use it is within the supervision and control of the legislature. The troublesome question is whether the use be public.
>
> In most branches of business the public has an interest. That interest varies according to surrounding conditions of the particular business in question. If it be a monopoly the interest of the public to be fairly and conveniently served is much greater than when the monopoly ends by forced, wholesome competition. A distinction must be made between a public use and a use in which the public has an interest. In the former case the public may control because it is a use within the function of government to establish and maintain. In the latter case it is a privileged enterprise that serves the public and in which it is interested to the extent of its necessities and convenience. The former is clearly within the control of the legislature while the latter may not be."

And continues:

> "It is conceded by all authorities that common carriers, common ferries, common roads, common wharves, common telegraphs and common telephones, etc., and common grist mills and common lumber mills are of that public nature to be put under public control, whether operated under the authority of charters from the state or by individual enterprise. Each of these cases is within the function of government to establish and maintain and, therefore, to control by whomsoever exercised."

In the Edwards case the defendant was convicted under two counts of the indictment, the first of which was for refusing to receive grain at his grist mill, there tendered to be ground, and the second for taking excessive toll. This incident, *i. e., the duty to serve the public on demand,* appears to be an inseparable adjunct to a public business, and the query arises whether or not a business is affected with a public use to such an extent as to authorize legislative control of rates where the right of the public to demand service does not exist, and where in the conduct of the business the right to pick and choose who shall be served and who not is present.

If the state has the right to regulate the rates of premium of fire insurance on the ground that the business of fire insurance is affected with a public use, then it follows that all fire insurance companies must issue their policies of insurance to all who demand them, that if they refuse, the issuing of the policy can be compelled by *mandamus,* or damages may be recovered in a suit at law for the refusal.

In the case of every business which has been held to be affected with a public use to the extent that the public can demand service as a matter of right, some actual physical service is rendered. The common carrier transports passengers and freight. The telegraph and telephone companies give the use of their wires for the transmission of messages. The public grist mill and saw mill grind the corn and cut the logs of their customers. The public wharfinger gives the loading and unloading facilities at his wharf. The inn keeper supplies lodging to the public. The water, gas and electric compa-

nies supply to their customers the particular products in which they deal. The warehouseman stores the grain or tobacco of his customers, and the owners of public elevators assist in the transportation of grain by the common carrier. Public stock yards are also adjuncts to transportation and receive and care for the live stock of those who patronize them. Turn pikes, canals and ferries are but branches of the business of the common carrier.

The situation of the fire insurance company toward the public is, however, very different. It does not furnish to those who deal with it any service such as is supplied by common carriers and allied industries, nor does it supply public necessities as is the case of water companies, gas and electric lighting companies, but, on the contrary, it merely makes a contract by which it agrees, on the happening of certain contingencies, to reimburse the other party to the contract for the loss which he has suffered. In short, the business of the fire insurance company is the making of contracts with individuals, or the refusal to make such contracts, as it may see fit.

That the decision in *Munn* v. *Illinois* was based upon the monopolistic feature of the business conducted by the plaintiffs in error, is clearly shown by the opinion of Chief Justice Waite, and is most strongly emphasized by a consideration of *Allnutt* v. *Inglis*, 12 East 527, the leading authority cited by the court.

In addition to the quotations from Lord Ellenbrough's opinion in that case made by the Chief Justice, the following excerpt shows conclusively

that the London Dock Company had not only a *virtual* but also a *legal* monopoly of the warehousing of wines in bond.

Lord ELLENBROUGH says (p. 540):

> "There are no other places at present lawfully authorized for the warehousing of wines (such as were imported in this case) except these warehouses within the London dock premises, or such others as are in the hands of this company." * * * "Here then the company's warehouses were invested with the monopoly of a public privilege, and therefore they must by law confine themselves to take reasonable rates for the use of them for that purpose. *If the crown should hereafter think it advisable to extend the privilege more generally to other persons and places, so far as that the public will not be restrained from exercising a choice of warehouses for the purpose, the company may be enfranchised from the restriction which attaches upon a monopoly;* but at present while the public are so restricted to warehouse their goods with them for the purpose of bonding, they must submit to that restriction."

The case of *Chesapeake & Potomac Telephone Co.* v. *Manning*, 186 U. S. 238, 246, *supra*, clearly shows the distinction that the courts make between fixing charges on a public business and a purely private business.

And we respectfully submit that the following cases, *American Live Stock Commission Co.* v. *Chicago Live Stock Exchange*, 143 Ill. 210; *Ladd* v. *Southern Cotton Press Co.*, 53 Texas 172; *Ex parte* Dickey, 144 Cal. 234; *Queen Insurance Co.* v. *State*, 86 Texas 250; *State ex rel. Star Publishing Co.* v. *Associated Press*, 159 Mo. 410; *Horney* v. *Nixon*, 213 Pa. St. 20; *Louisville & N. R. Co.* v. *West Coast Naval*

Stores Co., 198 U. S. 483, and in fact all those cases which we have cited under the second heading of this brief, clearly show the distinction between the Munn case and the case at bar, and further show the distinction between a quasi public corporation and a private corporation, or between a corporation or individual whose business is impressed with a public use and that of an individual or corporation whose business is purely private.

In decisions of this court rendered subsequent to that of *Munn* v. *Illinois*, and in which the decision and opinion in that case are commented upon, this court has made clear what was there meant by the somewhat indefinite phrases "a use in which the public has an interest," "a public use of property" and "property affected with a public interest."

The Munn case was decided March 1, 1877. On the 26th of the same month the Supreme Court decided the case of *Burlington* v. *Beasley*, 94 U. S. 310. The opinion is by Mr. Justice Hunt who concurred in the majority opinion in *Munn* v. *Illinois*.

The question involved in *Burlington* v. *Beasley* was the validity of certain bonds issued under the authority of a statute of the State of Kansas empowering townships to issue bonds for "works of internal improvement." The bonds in question were issued in aid of a steam grist mill. All grist mills, whatever the power used, are by a Kansas statute declared to be public.

The concluding paragraphs of the opinion are as follows:

> "Under our recent decision in *Munn* v. *Illinois*, and the other cases upon kindred subjects,

it would be competent to the legislature of Kansas to regulate the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a *public work* within its meaning, and that the construction and equipment of a steam grist mill was an internal improvement.

The case of *Loan Asso.* v. *Topeka,* 20 Wall. 661, will adjudge these bonds to be legal. The point is there expressly made that bonds, when issued for a *public purpose, a public use,* which it is the right and duty of the state government to assist, are valid. The issue we are considering falls within this definition."

Burlington v. *Beasley, supra,* was undoubtedly under consideration by the Supreme Court at the same time as *Munn* v. *Illinois,* and from the application of the doctrine of the latter case, to the facts presented in the former, the conclusion is irresistable that the court considered the words "affected with a public use" synonomous with "public use," "public business" or "public employment."

In *Wabash, etc., Railway Co.* v. *Illinois,* 118 U. S. 557, Mr. Justice MILLER, who also concurred in the majority opinion in *Munn* v. *Illinois, supra,* speaking of that case and of the so-called "Granger cases," decided at the same time, says:

"These three cases, with others concerning the same subject, were argued at the same time by able counsel, and in relation to the different laws affecting the subject, of the States of Illinois, Iowa, Wisconsin and Minnesota; the main question in all the cases being the right of the state to establish any limitation upon the power of the railroad companies to fix the price at which they would carry passengers and freight. It was strenuously denied, and very confidently by all the railroad companies, that any legisla-

tive body whatever had a right to limit the tolls and charges to be made by the carrying companies for transportation. And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges.

The importance of that question overshadowed all others, and the case of *Munn* v. *Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehousing business in Chicago, free from any claim of right or contract under an act of incorporation of any state whatever, and free from the question of continuous transportation through several states. *And in that case the court was presented with the question, which it decided, whether anyone engaged in a public business, in which all the public had a right to require his service, could be regulated by acts of the legislature in the exercise of this public function and public duty, so far as to limit the amount of charges that should be made for such services.*"

In *Dow* v. *Beidleman*, 125 U. S. 680, Mr. Justice GRAY says that *Munn* v. *Illinois* affirmed "the doctrine that by common law carriers and other persons exercising a *public employment* could not charge more than a reasonable compensation for their services."

In *Budd* v. *New York*, 143 U. S. 517, heretofore cited, Mr. Justice BLATCHFORD, delivering the opinion of the court, summarizes that part of the opinion in *Munn* v. *Illinois*, now under consideration, in the following language:

"This court, in *Munn* v. *Illinois,* the opinion being delivered by Chief Justice Waite, and there being a published dissent by only two justices, considered carefully the question of the repugnancy of the Illinois statute to the Fourteenth Amendment. It is said, that under the powers of government inherent in every sovereignty, 'the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good'; and that, 'in their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn-keepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold.' It was added: 'To this day, statutes are to be found in many of the states upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property.' It announced as its conclusions that, down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law; that, when private property *was devoted to public use,* it was subject to public regulation; that Munn and Scott, in conducting the business of their warehouse, pursued *a public employment* and *exercise a sort of public office, in the same sense* as did a *common carrier, miller, ferryman, inn-keeper, wharfinger, baker, cartman* or *hackney coachman;* that they stood in the very gateway of commerce and took toll from all who passed; that their business tended 'to a common charge,' and had become a thing

> of public interest and use; that the toll on the grain was a common charge, and that according to Lord Chief Justice Hale, every such warehouseman, 'ought to be under a public regulation, viz.:' that he 'take but reasonable toll.'"

From the explanation and construction of the doctrine announced in *Munn* v. *Illinois,* contained in the cases above quoted from, in many of which the opinions were written by judges who took part in the decision of the Munn case, it seems beyond dispute that in the opinion of this court "a public interest in the use of property" is equivalent to "*a public use of property*"; that by "property affected with a public interest" was meant property devoted to *a public use,* employed for *a public purpose* or in *a public work;* that Munn and Scott "pursued a public employment" and were "engaged in *a public business.*"

The opinion of his Honor, Judge Pollock, in this case, (Trans. Rec., 22-33) 189 Fed. 769, was rendered after the first opinion of this court was handed down in the case of *Noble State Bank* v. *Haskell,* 219 U. S. 104, in which Mr. Justice HOLMES said:

> "In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what in its immediate purpose is a private use."

And also, referring to the police power of the state, it was said in that first opinion by Mr. Justice HOLMES:

> "It may be said in a general way that the police power extends to all the great public

> needs. It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality, or a strong and dominant opinion, to be greatly and immediately necessary to the public welfare."

We respectfully submit that in reading Judge Pollock's opinion it will be found that these two quotations were the controlling factors which influenced him in the opinion which he rendered.

A petition for rehearing was filed in the Noble State Bank case, and thereafter Mr. Justice Holmes delivered a supplemental opinion in which the rehearing was denied, but in which the propositions contained in the foregoing quotations from the original opinion were modified, and in this last opinion, reported in the 219 U. S. 575, Mr. Justice HOLMES says:

> "*Clark* v. *Nash* and *Strickley* v. *Highland Boy Gold Mining Co.* were cited to establish not that property might be taken for a private use, but that among the public uses for which it might be taken were some, if looked at only in their immediate aspect according to the approximate effect of the taking, might seem to be private."

We think the last above quotation clearly shows that private property cannot be taken for private use in any event, either where the amount is large or small.

Upon the statement as to the extent of the police power, Mr. Justice HOLMES in the supplemental opinion, says:

> "The analysis of the police power, whether correct or not, was intended to indicate an interpretation of what has taken place in the past, *not to give a new or wider scope to the power.*"

We submit, therefore, that the effect of the modification of the original opinion thus made by this court takes away the entire force and effect of the opinion rendered by his Honor, Judge Pollock.

Another recent decision of this court which influenced Judge Pollock in sustaining the demurrer to the bill of complaint of appellant is that of the *German Alliance Ins. Co.* v. *Hale,* 219 U. S. 307. The public interest in the business of fire insurance there commented upon is of the same character as the public interest referred to in *Lowell* v. *Boston,* 111 Mass. 454, and other cases heretofore cited upon the proposition that a general public interest is not equivalent to a public use. The public interest in insurance, referred to in the above cited case in this court, is of that kind which has frequently been held to justify regulation by the state, but is not of the character to make the business of fire insurance a public business and to give to the state the power to fix the rates of premium which fire insurance companies shall receive for their policies.

In conclusion we beg to refer to the case of *Paul* v. *Virginia,* 8 Wall. 168, and what this court there said of fire insurance policies:

> "The policies are simple contracts of indemnity against loss by fire entered into between the corporations and the insured for a consideration paid by the latter. * * * They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration."

We think no one will deny the proposition that they are contracts entered into between private corporations or persons upon such terms as may be

agreed to between themselves. In other words, they are personal contracts. If the state can arbitrarily fix the consideration for such personal contracts—the price which the insurer may charge and the assured shall pay therefor—then we submit that by the same reasoning this court should hold that the state may fix the price at which flour and meal, oil and lumber and coal, and every other commodity dealt in by the people shall be sold.

We most earnestly contend that the act of the State of Kansas complained of takes the property of appellant, and of every other fire insurance company doing business in that state, and subject to the act, for private use.

As was said by Judge SANBORN in *Dodge* v. *Mission Township,* 107 Fed. 827:

> "A legislative act which takes or undertakes to authorize the taking of private property for a private object, either by taxation, or by the exercise of the power of eminent domain, or by any other means, is not a law, but an arbitrary decree, whereby the property of one citizen may be transferred to another. Such an act is beyond the limits of the powers granted by the people to the legislatures of the states, and is without legal force or effect."

The decree of the court below sustaining the demurrer to the bill of complaint should be reversed.

Respectfully submitted,

JOHN G. JOHNSON,
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DEC 9 1913
JAMES D. MAHER
CLERK

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

GERMAN ALLIANCE INSURANCE COMPANY, *Appellant*,

vs.

IKE LEWIS, as Superintendent of Insurance of the State of Kansas, *Appellee*.

No. 120.

Appeal from the United States Circuit Court, District of Kansas, First Division.

BRIEF AND ARGUMENT FOR APPELLEE.

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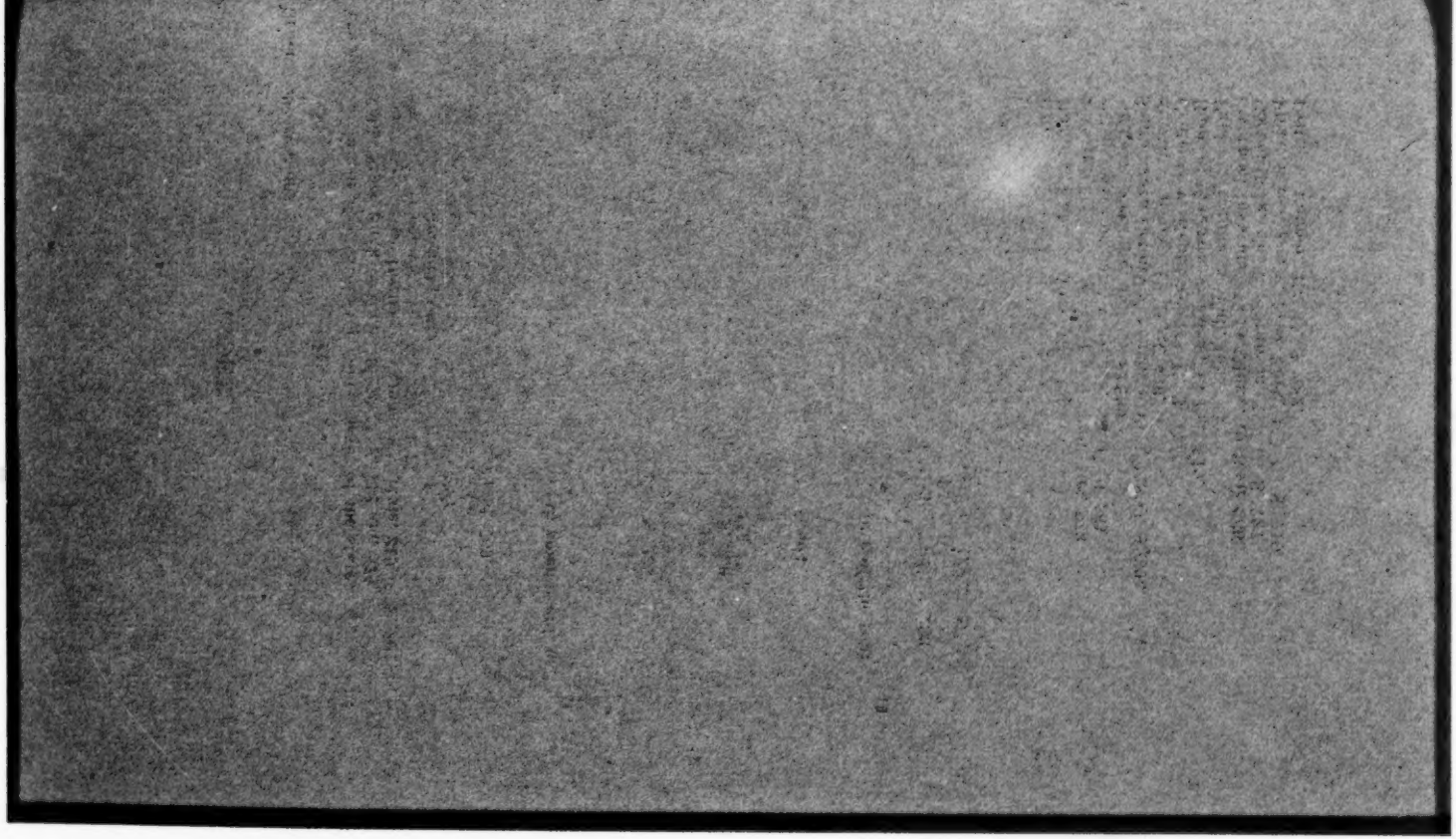

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In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1913.

GERMAN ALLIANCE INSURANCE COMPANY, *Appellant*,
vs.
IKE LEWIS, as Superintendent of Insurance of the State of Kansas, *Appellee*.

No. 120.

Appeal from the United States Circuit Court, District of Kansas, First Division.

BRIEF AND ARGUMENT FOR APPELLEE.

STATEMENT OF THE CASE.

The bill of complainant alleges that chapter 152 of the Laws of Kansas of 1909 is unconstitutional, being repugnant to section 1 of the fourteenth amendment to the constitution of the United States, in that it denies to the complainant equal protection of the laws and deprives it of liberty and property without due process of law. Several other matters are alleged in the original bill, but the bill itself, as shown on page 16 of the transcript, contains the following paragraph:

"Your orator further alleges that it is not the purpose or intent of your orator by this, its bill, to attack the orders hereinbefore referred to, heretofore made by the defendant, claiming to act under the provisions of the act of the legislature of the state of Kansas hereinabove set out, on the ground that such orders were not made in strict compliance with the provisions of said act; but to have the said act in its entirety declared by

this honorable court to be unconstitutional and void for the reasons hereinbefore alleged, and to have the defendant herein restrained and enjoined from enforcing orders made by him under the provisions of an unconstitutional and void law."

The law complained of is set out in full in the memoranda of decision of the lower court, and is found on pages 23 to 26 of the printed transcript. The substance of the sections of that law which we think the court should notice we state very briefly as follows:

Section 1 provides that every fire insurance company shall file with the superintendent of insurance general basis schedules, showing rates on risks and all changes, etc., which in any wise affect such rates or the value of the insurance.

Section 2 provides that no change shall be made in such schedules, except after giving ten days' notice to the superintendent of insurance; the length of such notice, however, may be shortened for cause.

Section 3 provides that when the superintendent shall determine that any rate is excessive or unreasonably high, or not adequate to the safety or soundness of the company, he may direct the company to file a higher or lower rate, which shall be commensurate with the character of the risk, but shall be reasonable.

Section 4 provides that no fire insurance company shall insure property in the state unless a schedule of rates has been filed as required by the act, nor write insurance at a different rate, or refund or remit any portion of the rates to any person, or grant any privileges except as specified in the schedule.

Section 7 provides that no fire insurance company shall, directly or indirectly, by any special rate, charge or receive from any person a different compensation for the insurance than it charges or receives from other persons under like circumstances; and any company violating the provisions of this section is declared guilty of unjust discrimination.

Section 9 provides that the superintendent of insurance shall not make any regulation or order without giving the company concerned reasonable notice thereof and opportunity to be heard, and allows such company or any person or municipality interested in such order the privilege, within thirty days after the order is made, to bring an action against the superintendent in any district court of Kansas to have

such order vacated. And this section provides that no action shall be brought in any of the courts of the United States to set aside any order made by the superintendent under the provisions of the act before all of the above remedies have been exhausted by the party complaining.

To the bill the defendant demurred. The demurrer was sustained, and from the decree sustaining the demurrer the appeal is taken.

The sole error relied upon by the appellant, as stated on page 7 of its brief, is the refusal of the lower court to hold that the act of the legislature of Kansas is unconstitutional because repugnant to that portion of section 1 of the fourteenth amendment which provides that no state shall deprive any person of life, liberty or property without due process of law.

ARGUMENT.

I.

General observations.

It will be seen by reference particularly to the ninth section of the law complained of, which is found on page 24 of the printed transcript, that the power given to the superintendent to change rates is not a power which the law allows him to exercise in an arbitrary manner. It gives him no jurisdiction to make any order without first giving the insurance company a reasonable notice thereof and an opportunity to appear and be heard in respect of the same; and allows the company, if it shall be dissatisfied with the order, thirty days thereafter in which to bring an action against the superintendent in any district court of Kansas; and further provides that when such action is brought by a company within said period of thirty days that no penalties or forfeitures shall attach an account of any failure of the company to comply with an order sought to be vacated until final determination of the suit; and allows the court to permit any company to write insurance at the rates which obtained prior to the ordering of the rate complained of, upon condition that the difference between the rate complained of and the rate at which it seeks to write insurance may be adjusted by the company with the

superintendent until final determination of the suit, when it shall be paid back to the company if the court find the company entitled to the same.

Furthermore, section 3 contains provisions which prevent the superintendent from acting in an arbitrary manner. That section provides, in substance, that the superintendent shall have no jurisdiction until he determines, first, that either the rate made by the company is unreasonably high, or that it is not adequate to the safety of the company; and even then he does not make the rate, but directs the company to file a higher or a lower rate, and that rate must be commensurate with the character of the risk, and in every case be reasonable. And under section 9, referred to above, the company then has a right to first have a hearing, upon due notice by the superintendent, and after such hearing, and within thirty days after an order made after such hearing, to bring proceedings in the state courts.

It is not complained in this case that the superintendent has actually or arbitrarily fixed rates that are unreasonable either as being excessive or too low. Neither is it conceded in this case that the complainant has sought to have any rates established by the superintendent changed by him, upon any application or in any hearing as provided by the act, or otherwise, or by any application by suit filed in the district court of any county in Kansas. And we think that that provision of section 9 of the act, as found on page 25 of the printed transcript, which provides that no action shall be brought in any courts of the United States until the company shall have exhausted the remedies provided by the act, in view of the reasonableness of the method of determining the rates, precludes the complainant from asking any order restraining the enforcement of the act; and the only question that could be presented to the court is whether or not the act, even with all these limitations, which guard against any arbitrary exercise of power on the part of the superintendent and compel him to act with reason and justice, is yet unconstitutional, upon the sole ground that an insurance company is such a corporation that it can do business in the state of Kansas free from any and every regulation by the state. This brings us to the second proposition

II.

The act complained of is within the police power of the state.

The appellant claims that a contract of fire insurance is a purely private contract, and the business of writing policies against loss by fire is a purely private business, not affected with any public use, and therefore beyond the constitutional power of the state to fix rates, and that to fix such rates is the taking of private property for the use and benefit of a private citizen.

We think that it must be admitted that the business of writing fire insurance is in general a proper matter of state regulation. All states have elaborate fire insurance laws. Those laws create departments of insurance, giving state officers the right to make examination of the books and affairs of companies; requiring the companies to pay certain fees and expenses and to make certain reports, to deposit certain guarantees, to conform their policies to certain provisions, to conform to certain requirements as to the investment of funds; prescribing penalties for making false reports or statements, and for violating other provisions of the law regulating such companies; requiring such companies to create firemen's relief funds, and regulating the appointment and business of agents, and many other regulations—all of which are conceded to be within the power of the state, not alone because these companies are corporations, but because they are engaged in a business which affects the public at large on account of its magnitude and on account of the fact that it is centralized within the control of certain large corporations, the management of whose business is so intricate that the average private citizen in dealing with them is placed entirely at a disadvantage, and which makes it so easy for the companies themselves by private agreement to entirely and arbitrarily regulate and control affairs which are of great importance to nearly every citizen of the state. This position is practically ignored in the very elaborate and very extensive brief filed by the able counsel for appellant, but it is recognized in the able memorandum decision of the Hon. JOHN C. POLLOCK, judge of the circuit court, in which this case was tried, which decision is found on pages 22 to 33 of the printed transcript. We quote some of the language of that decision as found on the following pages of the transcript (p. 30):

"In the light and trend of recent judicial decisions controlling here, can it be said the state must be denied the right to regulate the rates and charges of either foreign insurance companies transacting business within her borders as is complainant, or domestic insurance corporations of her own creation, in the exercise of her reserved powers, having in view the great magnitude of the business transacted by such companies, its intimate relation to the commercial business world, and the direct influence the business so transacted has on the prosperity of the individual citizen affected thereby?"

He quotes from the case of the Noble State Bank v. Haskell, 219 U. S. 112 and 575, which sustains the law of Oklahoma compelling banking institutions to contribute to a fund known as the bank guaranty fund. The decision also quotes from the case of the German Alliance Insurance Company v. Hale, 219 U. S. 307, wherein this court used the following language:

"We concur entirely in the opinion expressed by the state court, that the statute does not infringe the federal constitution nor deprive the insurance company of any right granted or secured by that instrument. The business of fire insurance is, as every one knows, of an extensive and peculiar character, and its management concerns a very large number of people, particularly those who own property and desire to protect themselves by insurance. We can well understand that fire insurance companies, acting together, may have owners of property practically at their mercy in the matter of rates, and may have it in their power to deprive the public generally of the advantages flowing from competition between rival corporations engaged in the business of fire insurance. In order to meet the evils of such combinations or associations, the state is competent to adopt appropriate regulations that will tend to substitute competition in the place of combination or monopoly. (Carroll v. Greenwich Ins. Co., 401, 411.) Regulations having a real, substantial relation to that end, and which are not essentially arbitrary, can not properly be characterized as a deprivation of property without due process of law. They are enacted under the power with which the states have never parted, of caring for the common good within the limits of constitutional authority. Insurance companies, indeed, all corporations, associations and individuals, within the jurisdiction of the state, are subject to such regulations, in respect to their relative rights and duties, as the state may, in the exercise of its police power and in harmony with its own and the federal constitution, prescribe for the public convenience and the general good. (Jacobson v. Massachusetts, 197 U. S. 11, 27, 31; Lake Shore &c. v. Ohio, 173 U. S. 285, 297.)"

This case is cited in Citizens Insurance Company v. Clay, 197 Fed. 435, which involves the question of the constitutionality of a law of Kentucky, which is similar to the Kansas law and is being attacked in the same manner.

The decision of Judge POLLOCK in the present case is reported in German Alliance Ins. Co. v. Barnes, 189 Fed. 769.

We again remind the court that one of the purposes of the law complained of is to prevent unlawful discrimination, as shown by sections 4 and 7, found on pages 23 and 24 of the printed transcript, and the broad purpose and the very apparent result, and the very thing that the complainant fears, is to prevent the complainant and other insurance companies from not only fixing rates arbitrarily by agreement among themselves, but from doing so unreasonably; and the effect of the law and the purpose of the law is, therefore, to prevent unreasonable combinations and agreements between insurance companies for fixing rates, and this purpose is clearly within the police power and is sanctioned by the most recent decisions of this court. That in the face of these purposes and in the face of the decisions referred to, showing the magnitude of the business of fire insurance, the complainant should make the claim that a contract of fire insurance is a simple private contract between a company and an individual, is no more or less than the argument that would be made in relation to all other kinds of public service corporations. There was a time when an individual undertook to carry his neighbor in his wagon for hire, and then held himself out to the public for that purpose; he became a common carrier. And from this simple beginning the business of hackmen, truckmen, ferrymen, steamship carriers, railroad corporations and all common carriers has grown from a beginning in a simple contract between individuals to a great business which interests all citizens.

III.

The act is not repugnant to section 1 of the fourteenth amendment, as state has full power of classification.

It is not within the scope of the fourteenth amendment to withhold from states the power of classification. If the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection.

Hays v. Missouri, 120 U. S. 68.

Railroad Co. v. Mackey, 127 U. S. 205.

Walston v. Nevin, 128 U. S. 578.
Bell's Gap Railroad v. Pennsylvania, 134 U. S. 232.
Pacific Express Co. v. Seibert, 142 U. S. 339.
Giozza v. Tiernan, 148 U. S. 657.
Columbia Southern Ry. v. Wright, 151 U. S. 470.
Marchant v. Pennsylvania Railroad, 153 U. S. 380.
St. Louis & San Francisco Ry. v. Mathews, 165 U. S. 1.

The supreme court of the United States, in the case of Railroad Co. v. Matthews, 174 U. S. 99, in sustaining the Kansas act allowing the recovery of reasonable attorney's fees against railroads in case of damages by fire, sustained it solely upon the ground that it was a police regulation, and in the opinion, rendered by Judge BREWER, the court quotes from the opinion of the Kansas supreme court, as follows:

"And in the opinion filed in the present case, 58 Kan. 447, 450, that court observed: 'Our statute is somewhat in the nature of a police regulation, designed to enforce care on the part of railroad companies to prevent the communication of fire and the destruction of property along railroad lines. It is not intended merely to impose a burden on railroad corporations that private persons are not required to bear, and the remedy offered is one the legislature has the right to give in such cases. This is the view heretofore held by this court which we see no reason for changing.' "

The court holds in its opinion that the act in controversy is valid and that the Kansas legislature had full authority to make such classifications.

Judge BREWER, in the Matthews case, further along in his opinion, says:

"The equal protection of the law which is guaranteed by the fourteenth amendment does not forbid classification. That has been asserted in the strongest language. (Barbier v. Connolly, 113 U. S. 27.) In that case, after in general terms declaring that the fourteenth amendment is designed to secure the equal protection of the laws, the court added (pp. 31 and 32):

" 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessites of society, legislation of a special character, having these objects in view, must often be had in certain districts, such

as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.'

"This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished. It is also clear that the legislature (which has power in advance to determine what rights, privileges and duties it will give to and impose upon a corporation which it is creating) has, under the generally reserved right to alter, amend or repeal the charter, power to impose new duties and new liabilities upon such artificial entities of its creation. (St. Louis, etc., Railway Co. v. Paul, 173 U. S. 404.) It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

IV.

The act is not repugnant to either the due process clause of the fourteenth amendment or the equal protection clause.

We fail to see upon what ground it can be urged that the act in controversy is violative of the due process clause of the fourteenth amendment.

In discussing this clause of the constitution, it is quite immaterial whether the company is to be considered a private corporation of a quasi-public corporation subject to the police power of the state.

By the terms of the act itself, an opportunity is given for the company to appear and be heard before any order made

by the superintendent of insurance is to become effective. After the order is made by the superintendent, the act provides that if the company shall be dissatisfied with the rulings of the superintendent or the fixing of any rate by him, that within thirty days the company shall have a right to institute a suit in any district court of the state to contest the validity of such order made by the superintendent, or rate fixed. . .

It is our understanding that whenever an act gives a party an opportunity to appear and be heard, and if then dissatisfied, that he shall have an opportunity to present his grievance in the courts, that "due process," within the meaning of the constitution, has been afforded him. It was urged that a Missouri statute violated the equal protection and the due process clauses of the fourteenth amendment.

In Orient Insurance Co. v. Daggs, 172 U. S. 561, it was urged, as in this case, that the act was unconstitutional, and for like reasons, and the court, referring to the equal protection clause, says (pp. 561, 565):

"It is not easy to make a succinct statement of the objections of plaintiff in error under this provision. Counsel says: 'The business of insurance includes insurance against damages on account of death, accident, personal injury, liability for acts of employees, damages to plate glass, damages by hail, lightning, high wind, tornadoes, and against damages to personal property on account of fire or casualty by other elements, as well as insurance against loss or damage to buildings on account of fire. . . . No other business is subject to the discrimination, in case such business is involved in litigation, of having the damages assessed without due process of law. The statute singles out persons engaged in fire insurance as against all other kinds of insurance, and as against all other kinds of business, and imposes the onerous and unusual conditions provided in the statute against such persons.' And again: 'The statute thus discriminates as to the subject matter, as to the parties, as to the mode of trial of actions at law and equity, and imposes upon this particular class of underwriters, as distinguished from all the rest of the world, conditions which abrogate its contracts, compel it to pay damages never sustained, and prevent it from having an investigation upon the trial by due process of law.'

"This mingles grounds of objection, and confounds the prohibitions of the provision we are considering with that of the next provision. Whether the statute of Missouri provides for 'due process' we shall consider hereafter, and upon that consideration determine how much of the complaint against it in that regard is true. Now we may confine ourselves to the

more specific contention that it discriminates between fire insurance corporations or companies and those engaged in other kinds of insurance.

"It is not necessary to state the reasoning upon which classification by legislation is based or justified. The court has had many occasions to do so, and only lately reviewed the subject in Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283. We said in that case that 'the state may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary. We see many differences between fire insurance and other insurance, both to the insurer and the insured—differences in the elements insured against and the possible relation of the parties to them, producing consequences which may justify if not demand different legislative treatment. Of course it is not for us to debate the policy of any particular treatment, and the freedom of discretion which we have said the state has is exhibited by analogous if not exact examples to the Missouri statute in Railway Company v. Mackey, 127 U. S. 204, 208, and in Minneapolis & St. Louis Railway v. Beckwith, 129 U. S. 26.

"In Railway Company v. Mackey, 127 U. S. 204, a law of Kansas was passed which abrogated as to railroads the rule of the common law exempting masters from liability to one servant for the negligence of another. It was sustained as a valid classification, notwithstanding that it did not apply to other carriers, or even to other corporations using steam. The law was objected to, as the statute of Missouri is objected to, on the ground that it violated the provisions of the constitution which we are now considering.

"To the first contention the court, by Mr. Justice FIELD, said: 'The plain answer to this contention is, that the liability imposed by the law of 1874 arises only for injuries subsequently committed; it has no application to past injuries, and it can not be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state.' And after further comment added: 'That its passage was within the competency of the legislature, we have no doubt.' To the second contention it was said: 'It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibi-

tion; but nothing can be farther from the fact.' The legislation was justified by the character of the business of railroad companies, and it was declared to be a matter of legislative discretion whether the same liability should or should not be applied to other carriers, or to persons and corporations using steam in manufactures.

"In Minneapolis Railway Company v. Beckwith, 129 U. S. 26, a law of Iowa making a class of railroad corporations for special legislation was sustained.

" 'What it is for a state to deprive a person of life, liberty or property without due process of law,' is not much nearer to precise definition to-day than it was said to be by Mr. Justice MILLER in Davidson v. New Orleans, 96 U. S. 97.

"The process 'of judicial inclusion and exclusion' has proceeded, and yet this court, in Holden v. Hardy, 169 U. S. 366, 389, again declined specific definition. Mr. Justice BROWN, speaking for the court, said: 'This court has never attempted to define with precision the words "due process of law," nor is it necessary in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government, which no member of the Union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.' These principles were extended to the right to acquire property and to enter into contracts with respect to property, but it was said, 'this right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers.'

"The legislation sustained was an act of the state of Utah making the employment of workingmen in all underground mines and workings and in smelters and all other institutions for the reduction and refining of ores or metals eight hours per day, except in cases of emergency, where life or property should be in imminent danger. The violation of the statute was made a misdemeanor. It was undoubtedly a limitation on the right of contract—that of the employer and that of the employed—enforced by a criminal prosecution and penalty on the former and on his agents and managers. It was held a valid exercise of the police powers of the state. These powers were not defined except by illustration, nor need we now define them. The case is a precedent to support the validity of the Missouri statute now under consideration.

"The statute provides as follows: 'In all suits brought upon policies of insurance against loss or damage by fire, hereafter issued or renewed, the defendant shall not be permitted to deny that the property insured thereby was worth at the time of the issuing of the policy the full amount insured therein on said property; and in case of total loss of the property insured, the measure of damages shall be the amount for which the same was insured, less whatever depreciation in value below the

amount for which the property is insured the property may have sustained between the time of issuing the policy and the time of the loss, and the burden of proving such depreciation shall be upon the defendant.' . . . It is also provided that no condition in any policy of insurance contrary to such provision shall be legal or valid.

"The specific objections which, it is claimed, bring the statute within the prohibition of the constitution, in the last analysis, may be reduced to the following: That the statute takes away a fundamental right and precludes a judicial inquiry of liability on policies of fire insurance by a conclusive presumption of fact.

"The right claimed is to make contracts of insurance. The essence of these, it is said, is indemnity, and that the statute converts them into wager policies—into contracts (to quote counsel) having for their basis speculation and profit, 'contrary to the course of the common law.' The statement is broad, and counsel in making it ignores many things. The statute tends to assure, not to detract from the indemnity of the contracts, and if elements of chance or speculation intrude it will be on account of carelessness or fraud. It is admitted that the effect of the statute is to make valued policies of those issued; and the conclusive effect which has been ascribed to their valuation has never been condemned as making them wager policies or as introducing elements of speculation into them."

And Justice McKENNA, who delivered the foregoing opinion, on page 566, says as follows:

"The statute is not subject to the condemnation that it regulates contracts made or rights acquired prior to its enactment; and we may repeat the language of Mr. Justice FIELD, in Missouri Railway Co. v. Mackey, supra, that 'it can not be successfully contended that the state may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters. Legislation to this effect is found in the statute books of every state.'

"That which a state may do with corporations of its own creation it may do with foreign corporations admitted into the state. This seems to be denied, if not generally, at least as to plaintiff in error. The denial is extreme and can not be maintained. The power of a state to impose conditions upon foreign corporations is certainly as extensive as the power over domestic corporations, and is fully explained in Hooper v. California, 155 U. S. 648, and need not be repeated."

It is contended that the act in controversy is repugnant to that portion of section 1 of the fourteenth amendment to the constitution of the United States which provides that no state

shall deny to any person within its jurisdiction the equal protection of the laws.

It is well settled that a corporation is not a citizen within the meaning of the constitutional provision that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Paul v. Virginia, 8 Wall. 168-179;
Ducat v. Chicago, 10 Wall. 410-415;
Liverpool Ins. Co. v. Mass. 10 Wall. 566-573.

In the case of the Orient Insurance Company v. Daggs, reported in 172 U. S. 561, in which it was asserted that a Missouri statute was violative of the fourteenth amendment of the constitution, the court said:

"It is not clear that this ground is relied on. It is, however, not available to plaintiff in error. A corporation is not a citizen within the meaning of the provision, and hence has not 'privileges and immunities' secured to 'citizens' against state legislation. This was decided in Paul v. Virgina, 8 Wall. 168, against a corporation upon which was imposed conditions for doing business in the state of Virginia and have been repeated in many cases since, including one at the present term, Blake v. McClung, 172 U. S. 239."

The court, in the case of Blake v. McClung, however, appears to hold that this provision of the fourteenth amendment may properly be invoked where a foreign corporation is within the jurisdiction of the state and subject to service of process in the state, and says:

"Since, however, a corporation is a 'person' within the meaning of the fourteenth amendment (Santa Clara County v. Southern Pac., 118 U. S. 394; Smyth v. Ames, 169 U. S. 466) may not the Virginia corporation invoke for its protection the clause of the amendment declaring that no state shall deprive any person of property without due process, or deny to any person within its jurisdiction the equal protection of the laws?"

The court then answered the question in the negative, upon the ground, however, that the Virginia company was not within the state of Tennessee, and says:

"It is equally clear that the Virginia corporation can not rely upon the clause declaring that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' That prohibition manifestly relates only to the denial by the state of equal protection to persons 'within its jurisdiction.'

Observe, that the prohibition against the deprivation of property without due process of law is not qualified by the words 'within its jurisdiction,' while those words are found in the succeeding clause relating to the equal protection of the laws. The court can not assume that those words were inserted without any object, nor is it at liberty to eliminate them from the constitution and to interpret the clause in question as if they were not to be found in that instrument. Without attempting to state what is the full import of the words, 'within its jurisdiction,' it is safe to say that a corporation not created by Tennessee, nor doing business there under conditions that subjected it to process issuing from the courts of Tennessee at the instance of suitors, is not, under the above clause of the fourteenth amendment, within the jurisdiction of that state."

In the case at bar it is manifest that the complainant is within the jurisdiction of the state, and being a person under the meaning of the decisions above referred to it clearly follows that it has the right to invoke that clause of section 1 of the fourteenth amendment referred to.

It therefore follows that the question to be determined is whether the act in controversy denies to the complainant the equal protection of the laws. If it does the act is unconstitutional.

It is asserted that, by reason of the exemption under section 11 of the act that is given to farm mutual insurance companies organized and doing business under the laws of the state of Kansas from the provisions of the act, that there is discrimination between the complainant and such mutual companies and a denial to the complainant of the equal protection of the laws.

The question therefore resolves itself into the proposition whether the legislature has a right to classify insurance companies.

It must be conceded that a state may deem a foreign corporation out of its territory entirely; and that in permitting it to enter the state may impose such conditions as it sees fit.

In Crutcher v. Kentucky, 141 U. S. 47, it was said:

"The insurance business, for example, can not be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is con-

fined to points and places wholly within the state. The cases to this effect are numerous."

Bank of Augusta v. Earle, 13 Pet. 519;
Paul v. Virginia, 8 Wall. 168;
Liverpool Insurance Co. v. Mass., 10 Wall. 566;
Cooper Mfg. Co. v. Ferguson, 113 U. S. 727;
Phila. Fire Asso. v. New York, 119 U. S. 110.

In the case of Fritts v. Palmer, 132 U. S. 282, in construing a Colorado statute which restricted the rights of foreign corporations doing business in the state to execute a valid mortgage until all its liabilities due to Colorado citizens had been extinguished, the court says:

"No question is made in this case. Indeed, there can be no doubt as to the validity of these constitutional and statutory provisions, so far at least as they do not directly affect foreign or interstate commerce."

In Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, this court said that:

"The right of the people of the state to prescribe generally by its constitutional laws the terms upon which a foreign corporation shall be allowed to carry on its business in the state has been settled by this court."

The state has full power to distinguish, select and classify objects of legislation without denying equal protection of the laws.

Mo. Ry. Co. v. Mackey, 127 U. S. 209;
Barbier v. Connelly, 113 U. S. 32;
Soonhing v. Crowley, 113 U. S. 703;
Railway Tax cases, 115 U. S. 322;
Home Ins. Co. v. New York, 134 U. S. 606;
Pac. Express Co. v. Seibert, 142 U. S. 339;
Orient v. Daggs, 172 U. S. 562;
New York, etc., v. Bristow, 151 U. S. 571.

V.

The validity of the act can be sustained under the police power of the state, as well as under the power of the state to regulate corporations created by it, or permitted by it to do business within its borders.

Among the very many definitions given by text-writers and judges of what the "police power" of the state is, is that given by Professor Freund, as follows:

"The power of promoting the public welfare by restraining and regulating the use of liberty and property."

It is our contention that this definition of the police power of the state complies in all respects with the power sought to be used by the state in its legislature enacting the law in controversy.

It is within the general scope of police power to prevent unreasonable charges as constituting a form of economic oppression, and as a means of prevention, to fix rates. Such legislation will necessarily apply to particular classes of business. The justification for regulating charges in some particular business would usually be that it constitutes a *de jure* or a *de facto* monopoly, or that it is essential to the industrial welfare of the community.

The legislature of Kansas determined that it was essential to the industrial welfare of the community that all insurance companies doing business in the state should charge reasonable rates. There seems to be no case in which a reasonable regulation of charges has been declared unconstitutional on the ground that the legislature does not possess such power.

The statute in controversy in requiring insurance companies doing business in the state to file schedules for reasonable rates is only substituting a statutory for a common-law regulation and does not establish a new principle, for by the common law all insurance companies would be compelled to charge reasonable rates for their services. Likewise by the common law the obligation to render to all alike at the customary rates the ordinary services for which the corporation is created is imposed upon insurance companies on account of the nature of their business and for the reason that such companies are affected by the public interest.

The supreme court of Kansas has held in numerous decisions

that fire insurance business has come to be *a business public in its nature* and *clothed with a public interest* and for that reason such business is subject to legislative regulation.

It was contended that the act of 1893 allowing attorney's fees to plantiffs in suits upon fire insurance policies was unconstitutional.

In Assurance Co. v. Bradford, 60 Kan. 85, the court says:

"The fourth objection relating to constitutionality of the act of 1893, allowing attorney's fees to plaintiffs in suits upon fire insurance policies, is likewise unsound. It has been held by this court that a similar statute, imposing attorney's fees in suits against railroad companies for negligently setting out fires, is not a violation of the fourteenth amendment to the constitution of the United States. (Railroad Co. v. Matthews, 58 Kan. 447, 49 Pac. 602.) In that case the statute under consideration was held to be a police regulation, proper to be made and enforced, in view of the public character of railroad companies and the frequency with which injuries by fire were committed by them. In principle the present case is nowise different from the one cited. Fire insurance has come to be a business public in its nature. It has come to be 'clothed with a public interest,' and is therefore properly a subject of legislative regulation. The state is interested in the preservation of the property of its citizens, that the general values of the commonwealth may not be impaired. Especially is it interested in the preservation of its homes and their rebuilding when destroyed. To the end that insurance companies may be compelled to respect the obligations voluntarily taken upon themselves to subserve the policies of the state in these respects, the legislature may rightfully impose upon them the repayment to insurers of attorneys' fees necessarily incurred in suits to make good their delinquencies. To do so is no violation of the fourteenth amendment declaring that 'no state shall deny to any person within its jurisdiction the equal protection of the law.' That amendment has never been held to deny to a state the right properly to classify the subject of its legislation and to impose upon the different classes differing restrictions and regulations. On the contrary, it has been repeatedly held that such right of classification exists. It was so held in Gulf R. R. Co. v. Ellis, 165 U. S. 155, upon which counsel for plaintiff in error rely. The fundamental error, however, in that and similar cases is the failure to differentiate railroad, insurance and other like coporations from private individuals and purely private corporations, and to view the public character of the former and the private character of the latter as bases for a just and reasonable classification, as was done by the courts in the older and better-considered cases. Between the subjects

of the classification made in the act of 1893 there is no discrimination; there is no denial to any one of the equal protection of the law."

And again, in Atkinson v. Woodmansee, 68 Kan. 74, the court says:

"The business of fire insurance has likewise assumed such a peculiar and special relation to the public welfare that the legislature is authorized to provide special penalties for breaches of contracts made in its prosecution."

In the case of Fidelity Mutual Life Association v. Mettler, 185 U. S. 322, it was contended that a statute of Texas imposing a penalty of 12 per cent damages with a reasonable attorney's fee upon like companies who should default from payment of their policies was in violation of the constitution of the United States. On page 326, in an opinion rendered by the chief justice, the court says as follows:

"It is apparent from the various sections of the title relating to insurance, to which we have before referred, that this particular liability amounted to one of the conditions on which life and health insurance companies were permitted to do business in Texas, and the power of the state in the matter of the imposition of conditions on its own and foreign corporations, has been repeatedly recognized by this court. If, however, notwithstanding the acceptance of these conditions, the constitutionality of the particular condition were nevertheless open to question, we must decline to sustain the objection. The reasoning in Railroad Company v. Matthews, 174 U. S. 96, applies rather than that in Railway Company v. Ellis. The ground for placing life and health insurance companies in a different class from fire, marine and inland insurance companies is obvious, and we think that putting them in a different class from mutual benefit and relief associations doing business through lodges, and benevolent associations of the character mentioned in the Texas statutes, is not an arbitrary classification, but rests on sufficient reason. The legislature evidently intended to distinguish between life and health insurance companies engaged in business for profit (and we are not called on to refine as to the distribution of such profits), and lodges and associations of a mutual benefit or benevolent character, having in mind also the necessity of the prompt payment of the insurance money in very many cases in order to provide the means of living of which the beneficiaries had been deprived by the death of the insured.

"Orient Insurance Company v. Daggs, 172 U. S. 557, Waters-

Pierce Oil Company v. Texas, 177 U. S. 28, New York Life Insurance Company v. Cravens, 178 U. S. 384, are in point and are decisive.

"In Insurance Company v. Warren, 181 U. S. 73, a section of the Revised Statutes of Ohio provided in effect that no answer to any interrogatory made by the applicant for the policy should bar the right to recovery or be used in evidence on a trial unless it was clearly proved that such answer was wilfully false and was fraudulently made, that it was material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued; and, moreover, that the agent of the company had no knowledge of the falsity or fraud of such answer; and this provision was only applicable to life insurance companies. The constitutionality of that act was upheld by the supreme court of Ohio, and this court affirmed its judgment, and in the opinion the language used in Waters-Pierce Oil Company v. Texas was quoted: 'A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. The purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader meaning to foreign corporations.' And we added: 'It was for the legislature of Ohio to define the public policy of that state in respect of life insurance, and to impose such conditions on the transaction of business by life insurance companies within the state as was deemed best. We do not perceive any arbitrary classification or unlawful discrimination in this legislation, but, at all events, we can not say that the federal constitution has been violated in the exercise in this regard by the state of its undoubted power over corporations."

It is not questioned, we assume and in fact it can not be questioned, but that every state has the right to determine for itself, through its proper officers, whether or not any insurance company shall be permitted to do business whose financial condition does not comply with and satisfy the requirements of the state law. These laws regulating the conduct of insurance business in the respective states have never been questioned.

It is asserted, however, by the complainant in its bill that the business of fire insurance is a private business, and for that reason is not under the control of the legislature, or at least not subject to having the legislature determine that the charges for conducting such business shall be reasonable.

We contend, however, that insurance business is not and can not be placed upon the same plane as the private business of an individual. In Pennsylvania a statute makes it unlawful for a policy of insurance to be issued by any person, persons, or firm, or association, unless authority to do so is expressly conferred by a charter of incorporation. The constitutionality of this statute was raised in the case of Commonwealth v. Vrooman, 164 Pa. St. 306, and its validity sustained in an exhaustive opinion.

The statute was sustained under the police power of the state, the court holding that on account of the nature of the business it was a proper subject for the exercise of the police power of the state, and in commenting upon the subject the court says:

"Now, the question whether any particular subject is so related to the public good as to justify the exercise of this power in its control is one for the determination, in the first instance, of the lawmaking branch of the government. In disposing of it, the legislature is subject to no limitations, except such as the constitution of the state may impose. Within the lines set by constitutional provisions, the power of the legislature is practically absolute; but, if it is alleged that a given police regulation violates the fundamental law, a question is raised for the determination of the courts, whose duty it is to apply the constitutional tests, and adjudge the law to be void if it is in conflict with them. . . ."

And further commenting, the court says:

"Before entering upon this question, three preliminary observations should be made: First, we must remember that the legal presumption is in favor of the constitutionality of the act, because it expresses the judgment of the legislative branch of the government upon that question. The legislature has considered the question, and passed upon it, and this makes a *prima facie* case in favor of the law. . . .

"Our third observation is that the question is not controlled by common-law maxims. The police power must necessarily enlarge its range as business expands and society develops. The proper office of statutes is to remedy the defects and modify the operation of common-law rules to meet changed conditions in society and increased volume and improved methods in business.

"We come now to inquire whether the business of insurance against loss by fire is at the present time a proper subject for the exercise of the police power of the state. In examining

this question, it is important to know something about the magnitude of the business."

[And thereupon the court comments upon the amount of capital invested in such business and the amount of premiums paid by policyholders.]

"Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are, (*a*) the existence of a known danger to which all property owners are exposed, and against which they can not effectually protect themselves; (*b*) the strong probability that loss from this danger will fall upon but few of those who are exposed to it; (*c*) the certainty that, when the loss happens, it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; (*d*) some knowledge of the relative value of the property annually destroyed by fire, to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses, and secure a fair return for the capital employed.

"In view of the magnitude and the nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policyholders requires, (1) permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; (2) an honest and competent administration of these funds; (3) restraint against the division of the profits of the business whenever such division would injuriously affect the security of policyholders. How are these safeguards to be obtained?

"There is but one way in which they can be obtained, and that is by means of general laws regulating the insurance business. Corporations derive their existence from the state, and hold their franchises subject to legislative control. They are subject to the visitorial power of the commonwealth, and they may be, and are in fact, required to lay open before the several departments of state government, and before the public, the character and extent of their business, the profits realized, the dividends declared, and the investments made. The legality and business value of the methods, the economy and financial strength of the management, and the value of the security provided for the holders of policies in any given company, are therefore subjects upon which the proper state officers may be thoroughly informed, and which the public may investigate at will. Private individuals are not subject to the same visitorial power. They can not ordinarily be compelled to disclose their business methods, their financial condition, or the character of their investments. They can not be restricted in the use of either their capital or their profits, as

corporations may be. Those who deal with them must trust more to their personal integrity than the common experience shows to be safe. The state can compel a fair measure of fidelity in the management of these vast sums, and provide for the safety of the insured when, and only when, the business is in the hands of corporations.

"In the next place, it is important to consider what may be described as the trend of modern legislation on this subject. The states of the Union have severally entered upon legislation regulating insurance. In each an insurance department of the state government has been organized. A general supervision and control of insurance companies have been assumed by the states, and exercised through the insurance department. In our state this system of legislation began as early as 1810, and it has grown in bulk and importance with the growth of business and the development of the resources of the state. It fixes the minimum of actual capital necessary to the organization of a corporation for insurance against fire, on the stock plan, at $100,000. It provides for a reserve fund for the security of policyholders. It prohibits the division of profits in dividends to the injury of the reserve fund. It regulates the form of policy, and requires the application to be attached to, or made part of, the policy. It requires each company to submit detailed statements of the business done, of its assets and liabilities, and to show its financial condition. It requires companies organized under the laws of other states or countries to make certain deposits in this state, to secure those who are insured by them, and to appoint some suitable agent, on whom process may be served in actions brought against them. These regulations have been made from time to time as their importance has been felt by the public. They are all easy of enforcement against corporations. Some of them can not be enforced against private persons or partnerships. As a matter of fact, the business has for many years been left to the corporations, and regulations made to affect corporations have therefore met fully the public need. At this time, however, private capital is seeking employment in this field, and it signalizes its entry upon the field by a denial of the power of the state over it. The question has been raised by the corporations of other states, but I recall no case in which it has been raised by individuals. In Doyle v. Insurance Co., 94 U. S. 535, the supreme court of the United States stated the general rule thus: 'A state has the right to impose conditions not in conflict with the constitution of the United States on the doing of insurance business within its territory by an insurance company chartered by another state, or to exclude it altogether.'"

And the court thereupon holds that the business of insurance against loss by fire is, by reason of its magnitude, its im-

portance to property owners, and the nature of the business, a proper subject for the exercise of the police power of the state.

Under the constitution of the state of Kansas all corporations organized in that state are subject to all laws with reference to corporations that may be enacted after their charter for the creation or regulation of corporations. The provision in the constitution referred to, being section 1 of article 12, is as follows:

"Corporations may be created under general laws; but all such laws may be amended or repealed."

In the case of State v. Mo. Pac. Ry. Co., 33 Kan. 176, mandamus action was brought to compel the defendant railway companies to construct viaducts over their railroad tracks pursuant to an ordinance passed by the city of Atchison. In holding that the legislature or the council of a city with delegated authority could enact such ordinances or laws with reference to the corporation after it had been chartered, VALENTINE, J., speaking for the court, in the opinion said (p. 189):

"We might say that we have not examined critically the question as to how much of the defendants' corporate rights may have been obtained under and by virtue of their old territorial charters enacted by the old territorial legislature, or how small a portion of such rights have since been obtained under and by virtue of the constitution and laws of the state; but, however inviolable any of their rights which they may have obtained under their old territorial charters may be, it can not be denied that whatever corporate rights or powers they have obtained under or by virtue of the laws of the state, such rights are subject to modification and change by amendment or repeal of such laws."

Likewise in the case of Leavenworth v. Water Co., 62 Kan. 643, the supreme court held that the act of the legislature of 1897 requiring water supply companies to file itemized statements of income and expense accounts with city clerks applied to companies existing at the time of its passage. In considering this point in the opinion, it is said (pp. 647, 648):

"The defendant in this case is not an individual citizen nor a private corporation; that is, not a corporation for the private purposes of its members. It is a corporation formed for purposes of public service. It is in the performance of a public service as much as though it were serving the people of the

entire state. (Inhabitants of Wayland v. County Commissioners of Middlesex, 4 Gray [Mass.] 500.) Therefore, it may be controlled by the state in the interest of the public it agreed to serve, except that its vested rights may not be taken from it under the pretense of control. It has no vested right to withhold from the public information as to its operations under the very franchise the public conferred on it. Besides, it took its franchise to be a corporation and to serve the public under a constitutional reservation of power in the legislature to amend or alter the laws pertaining to its organization and the conduct of its business. (Const., art. 12, § 1.)"

A similar conclusion was reached in the case of Irrigation Co. v. Klein, 63 Kan. 484, wherein it is held that a company organized for irrigation purposes is subject to subsequent regulation by the legislature. At page 493 in the opinion CUNNINGHAM, J., says:

"The words 'public use,' *ex vi termini*, imply that the public is interested therein, and that in its sovereign organization and capacity the public retains the right of regulation and control, at least in a limited or qualified degree, over the exercise of any corporate power or function granted in the accomplishment of such public use; and we are free to say that, if we are held to consider the language of these sections as giving an unqualified right to the irrigation company to fix its charges for the use of water supplied by it, and determine whom its customers shall or shall not be, such action on the part of one legislature would not bind future ones; that irrigation being, as we have already decided, a public use, the public may not be forever foreclosed and bound upon the question of such details by the action of any legislature; and especially is this true in view of the control over all corporations which section 1, article 12, of the constitution, vests in the legislature. The facts that the legislature has bestowed the power of eminent domain upon irrigation companies, and that they have availed themselves of such right for the promotion of that object, render such companies liable to respond to all reasonable regulations in the matter of supply and rates as the legislature may thereafter impose, or courts fix in proper cases."

The proposition under consideration here is clearly illustrated by the case of West v. Bank, 66 Kan. 524. This was a proceeding to recover from the stockholder on his written subscription for the capital stock of the bank. One of the defenses in the action was that the suit was barred by the statute of limitation. A demurrer was filed to the plea of the defend-

ant setting up the statute of limitation. It was held by the trial court that the law governing the savings bank of which defendant was a stockholder was the savings-bank act, being section 128, article 16, chapter 23 of the General Statutes of 1868. The supreme court held, however, that this act was supplanted by sections 5 and 6 of the banking act, being Laws of 1891, chapter 43, which act provided specifically for the payment each month of the amount of the residue of the capital stock after the bank shall have commenced business, thus making the installments due five years prior to the institution of the suit.

In upholding the authority of the legislature in passing the act providing for the change as affecting banks organized prior to its passage, BURCH, J., delivering the opinion of the court, said (p. 536):

"Without entering upon an analysis of the two statutes, it is sufficient to say that the act of 1891 was intended to include a revision of the savings-bank act, and to be a substitute for it. In framing the new law some of the provisions of the old were retained. These are to be construed as a continuation of such provisions—not of the chapters and sections, but of the provisions merely. But the savings-bank act itself was superseded by the general law. From this it follows that section 128, article 16, chapter 23, General Statutes of 1868, was supplanted by sections 5 and 6 of the act of 1891, the latter of which is quoted above.

"Power to make such change in the law was granted to the legislature by the constitution, in section 1, article 12, which reads as follows: 'The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed.'"

The learned counsel for the complainant also urge that the act is void because it is an unreasonable exercise of legislative powers to delegate to the superintendent of insurance the duties imposed upon him by the act.

We would suggest in reply that if power exists in the legislature at all, it was the judge as to what duties it should delegate, and whether they were manifold and complex or not. It is quite immaterial as far as challenging the constitutionality of the act is concerned.

VI.

Does the law violate the federal constitution?

The complainant sets out several propositions upon which it complains that the law in question violates the constitution of the United States. These are:

1. That the statute denies the complainant the equal protection of the law in that it (*a*) distinguishes between the complainant and companies, individuals and partnerships engaged in the fire insurance business; and, (*b*) that the law distinguishes between the complainant, a regular stock fire insurance company, and farmers' mutual insurance companies organized and doing business under the laws of this state and insuring only farm property; and (*c*) in that it distinguishes between the complainant and others engaged in fire insurance and all other persons engaged in other private business.

2. That the statute in question deprives the complainants and stock fire insurance companies generally of property without due process of law, in that it authorizes the superintendent of insurance to fix maximum and minimum rates at which fire insurance must be written in the state of Kansas.

The first of these objections, numbered herein 1, is a question of classification, and will be so discussed. The subhead numbers are allegations of discrimination between the business of insurance and private business, and will be discussed later in connection with the second heading, relating to the right of the state to fix rates, and whether such power amounts to the deprivation of property without due process of law.

VII.

The classification made by the legislature.

We proceed then to discuss the classification made by this act. The general law concerning the right of the legislative power of a state to establish classifications in the exercise of police power is so well established and has been so frequently considered by the courts in late years that a few quotations from well-known cases will bring to mind the rules now generally accepted by all courts.

In the 4th Encyc. of the Supreme Court, page 357, we find the following language:

"The nature and extent of such legislation will necessarily depend upon the judgment of the legislature as to the security

needed by society. When the calling, profession or business of parties is unattended with danger to others little legislation will be necessary respecting it. But when the calling, or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. The concluding clause of the first section of the fourteenth amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished."

Two of the latest and best-known cases of the Supreme Court of the United States in which this question is considered are, Heath & Milligan Manufacturing Co. v. Worst, 207 U. S. 354, and Ozah Lumber Co. v. Union Nat'l Bank, 207 U. S. 256. In the first of these cases, on page 354, Justice McKENNA said:

"*We have declared many times, and illustrated the declaration, that classifications must have relation to the purpose of the legislature.* But logical appropriateness of the inclusion or exclusion of objects or persons is not required. A classification may not be merely arbitrary, but necessarily there must be great freedom of discretion, even though it result in ill-advised, unequal and oppressive legislation." (Mobile Co. v. Kimball, 102 U. S. 691.)

In the second case, Mr. Justice PECKHAM said:

"It is almost impossible, in some matters, to foresee and provide for every imaginable and exceptional case, and a legislature ought not to be required to do so at the risk of having its legislation declared void, *although appropriate and proper upon the general subject upon which such legislation is to act so long as there is no substantial and fair ground to say that the statute makes an unreasonable and unfounded general classification*, and thereby denies to any person the equal protection of the laws. In a classification for governmental purposes there can not be an exact exclusion or inclusion of persons and things. See Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255, and cases cited; Missouri, K. & T. R. Co. v. May, 194 U. S. 267, 48 L. Ed. 971, 24 Sup. Ct. Rep. 638. *We can see reasons for excepting merchants and dealers who sell patented things, in the usual course of business, from the provisions of the statute, and we think the failure to exempt some few others, as above suggested, ought not to render the whole statute void as resulting in an unjust and unreasonable discrimination.*"

It will be necessary, in order to ascertain whether the classification complained of is one which might reasonably be

adopted with a view of carrying out the purpose of the legislature in the law which it enacted, to consider what rights the legislature intended to remedy by its enactment of the law. These purposes must be ascertained from a consideration of the law itself construed in the light of such general facts and knowledge as are within the judicial notice of the court. This involves a consideration of the nature of the business of fire insurance.

It is evident from the statute that the legislature deemed it necessary that (*a*) rates should be as nearly uniform as possible and that insurers generally should be treated equitably and none discriminated against to the advantage of another; (*b*) that some restraint should be imposed upon those engaged in the business of fire insurance to prevent the rates becoming too high or too low; and, (*c*) certain procedure is established which, in the judgment of the legislature, was necessary to the accomplishment of the foregoing purposes.

The reason for these regulations and the right to make them will be considered later, but assuming now that the legislature does have this right, can it be said that the classification of companies into stock fire insurance companies engaged in all kinds of insurance on the one hand, and mutual companies engaged only in the insuring of farm property on the other, is an unreasonable use of the power of establishing classes? It seems to us that such a claim would be entirely without foundation. The legislature has from the beginning of government in Kansas maintained this very distinction. The business of stock insurance and mutual insurance is inherently different and controlled by different rules. Companies which engage in the insurance of farm property and those which include all kinds of risks are also clearly engaging in business of different character. The statutes of Kansas, long in force in this state, provide in detail for the organization of mutual fire insurance companies and stock fire insurance companies, and recognize in every detail the differences in the nature of the business in these two classes of companies. Indeed, it may be said that not only the statutes of Kansas and the general law on this subject, but the very nature of the business itself, makes these two classes of insurance. A clearer case, therefore, of the right of the legislature to exempt one from the operations of a law and to include the other can scarcely be imagined.

Now, referring to the provisions of the act in question, we find—

First, That the purpose is to secure uniformity of rates. The very nature of a mutual fire insurance company secures to every member of the company his insurance at the cost of the actual fire loss plus a very small amount for expenses, as the theory of the law and the company is that the business will be written without solicitation and the premiums in cash or notes taken and the balance at the end of the year distributed back to the policyholders, or if a deficiency should occur at the end of the year, the members pledge themselves to make up the same to the company and its mutual members. A law, therefore, requiring such a company to file schedules of rates would only establish the amount of the revenue required to be deposited before the company could enter upon business at the beginning of each year. This the legislature, in the exercise of its judgment, has sought to accomplish in another way, by different laws upon the statute books, and to have included it within this law would have been cumulative.

The foregoing also applies to the object of the legislature in attempting to prevent stock companies from charging too high or too low a rate for fire insurance throughout the state. Stock fire insurance, contrary to mutual insurance, is based upon the amount of capital subscribed and collected with which the company undertakes business. If the rate is too low, the capital of the company is impaired, and it is unable to pay its losses. If the rate be too high, too much profit accrues to the company on its capital and the insured is oppressed. Neither of these results can occur where the insurance is mutual. If the member joins the company under the provisions of the law in force, he understands he must make up the losses of the company, or in a sense he is insuring his own property, and if a profit results the money is paid back to the person who originally supplies it for the temporary use of the mutual fire insurance company. In other words, there is no question of profit or lack of profit included in the operation of mutual fire companies. As said before, their weakness lies in the question of their soundness.

It may not be out of place to suggest here the proposition which is discussed in detail elsewhere in this brief. One of the strongest reasons which can be assigned for the state exercis-

ing the power to regulate fire insurance rates is that which follows naturally from the exercise of that right and its influence in preventing conflagrations and fire loss in the state. If this reason be a sound one, as is elsewhere argued, it quite clearly follows that these dangers are not so great in farm communities, where the buildings are separated at great distance from each other and the insurance risks are small as compared with those in the city, as such dangers are in populous cities. This of itself supplies an excellent reason for the classification made by the legislature.

It might reasonably be considered that the legislature in attempting to fix maximum and minimum rates thought that those engaged in the business of fire insurance had in fixing the rates not given the property owner who constructed his property in such a way as to guard against losses by fire or who adopted unusual preventive means of such protection a just allowance on his rates for such care, and that citizens in general were thereby not encouraged to discourage fire losses. The very purpose of the act may have been to have compelled the proper allowance in making rates for such prudence on the part of property owners. It is easy to see how this would affect fire losses and the number of fires in a community. These considerations go to the very life of the police authority of the state.

As heretofore mentioned, the application of regulations to the business of fire insurance and that applied to private business and the right to make rules in relation thereto is more properly discussed in the subsequent headings of this brief, where we think it is fully established that insurance is in its nature a public business.

VIII.

Is insurance affected by public interest?

Considering now the question raised by the pleadings as to whether the fixing of the rates by the state deprives the complainant and others similarly situated of property without due process of law, we pass to a consideration of the second federal question. It will be conceded, of course, that the legislature has a right to prescribe regulations for any public business, and the determination of this question may be considered one of the most important in the entire case.

The power of the legislature to regulate the business of writing insurance in this state has been determined by our supreme court in The State v. Insurance Company, 30 Kan. 585, The State v. Phipps, 50 Kan. 609, and Blaker v. Hood, 53 Kan. 499.

In The State v. Insurance Company, 30 Kan. 585, the court says:

"The state has a right to say who may engage in the business of insurance, and upon what terms, and may proceed by civil action in *quo warranto* against any corporation created under the laws of the state, which without authority assumes to carry on the business of insurance."

In Blaker v. Hood, 53 Kan. 509, JOHNSTON, justice, says:

"The right to regulate and control the business of insurance as well as that conducted by mills and warehouses is no longer doubted."

In The State v. Phipps, 50 Kan. 619, SIMPSON, commissioner, uses this language:

"The right of state regulation of the business of insurance is universally recognized and upheld. . . . The state has power to regulate and control and to provide penalties for transgressions of its regulating and controlling statutes of the business of a foreign insurance company within its boundaries."

The Phipps case is one of special interest, as it was a case to enforce the antitrust laws of the state and to inflict penalties on persons who had entered into a compact to fix insurance rates. Matters of uniformity and the presence or absence of discrimination as to rates and prices are always closely related to the subject of the regulation and supervision of combines and monopolies; and in some jurisdictions the right of the government to fix prices forms a part of the remedial legislation adopted in relation to these subjects. This case, therefore, vindicates and upholds the most drastic use of the police power of the state in the regulation of the insurance business.

From the fact that the state of Kansas has for many years had a department of insurance under the control of a public officer, the superintendent of insurance, and these expressions of the supreme court, it may well be considered settled that the state government and the people of the state regard insurance as a business impressed with a public interest.

Freund on Police Power says, in sections 400 and 401:

"When we examine the nature of the restrictions on the business of banking and insurance, we find that they nearly all

aim at the losses resulting from insolvency of the bank or insurance company. This loss is to be averted by insisting upon some guaranty of financial stability. Provisions of this character are not absolutely confined to banking and insurance; in some states railroads or other public service corporations may not issue securities without complying with prescribed conditions, or without the consent of designated authorities; and the power of corporations to borrow may be generally limited. But in the case of banking and insurance they are not necessarily confined to corporations, and by far exceed the financial regulations imposed upon any other kind of business. While all the provisions furnish protection against fraud, they do not pretend to be limited to guarding against that danger, but plainly seek to prevent mere improvidence or inadequacy of resources.

"Banking and insurance, being peculiarly affected with a public interest, it follows that the right to carry on either business may be made to depend upon the compliance with certain conditions; and a license may be required as evidence of compliance. In New York, in the case of savings bank and trust companies, the authorization is only given upon ascertaining that the general fitness of the organizers for the discharge of the duties appertaining to the trust is such as to command the confidence of the community and that the public convenience and advantage will be promoted by such establishment."

This author takes it for granted that the business of writing fire insurance partakes somewhat of a public nature sufficient to warrant the legislature in interfering with what would ordinarily be the rights of the public to protect as they see fit the vast amount of insurance laws invoked by the legislatures in the United States, conclusively showing that the business of writing insurance is one that vitally affects the interest of the public, and is one with which the legislatures are interfering, and is one with which the legislatures have power to interfere. The legislatures can properly prescribe the terms of the contract; in other words, can determine what the form and terms of the policies shall be. This question was before the supreme court of Massachusetts in Ætna Life Insurance Company v. Hardison, 199 Mass. 181, and New York Life Insurance Co. v. Hardison, 199 Mass. 190. In the last case, NOLETON, chief justice, on page 197, uses this language:

"The first suggestion is that the legislature could not give the insurance commissioner power to pass upon the forms of policies to be issued, and, especially, could not provide that an

insurance company should be liable criminally for issuing a policy in a form not approved by him. Secondly, it is suggested that jurisdiction could not be given this court to review the action of the insurance commissioner in a case of this kind.

"The insurance commissioner is an administrative officer. The legislature prescribed the requirements in the forms of policies. It did not see fit to prescribe a standard form of life insurance companies, but stopped with an enactment of substantive provisions for all policies. It was proper to leave to the insurance commissioner the management of details in the administration of the law. It was proper to prohibit the use of policies that did not conform to the law, and to punish disobedience on the part of an insurance company. It was a reasonable regulation to require companies to submit the forms of policies to the insurance commissioner before using them, so that he could see whether the law was being obeyed. His duty was to approve of every form of policy that seemed to him correct. The insurance companies, after submitting their forms to him, had nothing to do but to go on with their business, unless he made objection within thirty days. If he made such objection, they were given a right to bring a suit in this court for the determination of the question whether their proposed action was within the law.

"With the power of regulation of the business of insurance, and of the conduct of corporations, domestic and foreign, belonging to the legislature, it seems to us plain that such companies may be forbidden to issue policies that are deemed contrary to law by an administrative officer, until the court can determine the legal questions involved."

For years the business of writing insurance has been controlled by law.

"As early as 1411 the business of making contracts of insurance had become of sufficient importance among the Venetians to direct legislative action, for on May 15 of that year we find that an ordinance was passed condemning and prohibiting the prevalent practice among the Venetian brokers of underwriting foreign risks. But it is evident that the underwriters did not at that early day regard insurance regulations with any greater respect than do their successors of the present time, for in June, 1424, an ordinance again prohibited . . . certain kinds of insurance." (Selected Essays in Anglo-American Legal History, vol. 3, p. 108.)

From Yale Readings in Insurance, by Lester W. Zartman, pages 9 and 10, we find that in the various kingdoms and provinces which now constitute the German Empire the various communal guilds had provided some crude insurance for

their members and in many places this function was transferred to the various municipalities as the guilds disappeared; that the transition from medieval guild plan of mutual help to the modern system was bridged by state insurance, and as the guilds lost their importance and private industry was not rapid enough to supply the void left by them, the state was forced to step into the breach; that such fire insurance is found in Germany, German-Austria, Denmark, Switzerland and Scandinavia.

In 1719 by act of parliament two companies were incorporated with the exclusive right of making sea insurance and all others were restrained from granting insurance as companies or partnerships on a joint capital. This monopoly continued until 1824. (Arnold on Marine Insurance, vol. 1, page 102.)

A discussion of this proposition is not complete without a reference to Munn v. People of Illinois, 4 Otto, 94 U. S. 113, book 24, L. Ed. 77, with which the court is familiar.

Instead, therefore, of insurance being private business, as is alleged in the complaint, it is seen that from the earliest times it has been considered a governmental power, and has been conducted either by the state itself or by private individuals under the strictest supervision by the government.

REGULATING INSURANCE.

Under this heading we respectfully refer to Ætna Life Insurance Company v. Hardison, 199 Mass. 181, and New York Life Insurance Co. v. Hardison, 199 Mass. 190, hereinbefore cited and quoted from, and we also call attention to 7 Ency. U. S. Sup. Ct. Reports, page 78, where this language is found:

"The grant of a corporate franchise to an insurance company is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law.

"An insurance corporation is subject to such reasonable regulations as the legislature may from time to time prescribe, for the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it.

"The charter of an insurance company does not exempt it from obligation to comply with the subsequently established police regulations of the state, for the inspection of such busi-

ness, and for the liquidation thereof, on the event of insolvency. Such regulations may be enforced against a corporation working under a prior charter without impairing the obligation of the contract."

Again, in 4 Ency. of U. S. Sup. Ct. Reports, on page 77, you will find this language:

"When a party has availed himself of the benefit of an unconstitutional law, he can not, in a subsequent litigation with others not in that position, aver its constitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect. And where a litigant in a state court avails himself of a right or power conferred by a state law, and joins in a trial or other proceeding in which he relies upon the statute as a valid act, he thereby waives all objections to its validity and estops himself from objecting to it as unconstitutional."

In Northwestern National Life Insurance Co. v. Riggs, 203 U. S. 243, 51 L. Ed. 173, we find this language:

"The business of life insurance is of such a peculiar character, affects so many people, and is so intimately connected with the common good, that the state creating the insurance corporations and giving them authority to engage in that business may, without transcending the limits of legislative power, regulate their affairs, so far, as least, as to prevent them from committing wrong or injustice in the exercise of their corporate functions. The state may well say to its own corporate creatures engaged in the business of life insurance that they shall not refuse to pay what they agreed to pay simply because of some representation made by the insured which did not actually contribute to the contingency or event on which the agreement to pay depended. If a life insurance corporation does not approve such a restriction upon the conduct of its affairs it is privileged to cease doing business."

Other cases which bear upon this question which uphold the power of the legislature to regulate the business of fire insurance are—

Phœnix Insurance Co. v. Fire Department of Montgomery (Ala.), 42 L. R. A. 468.

Trustees of Exempt Firemen's Benevolent Fund v. Roone, 93 N. Y. 313.

Firemen's Ben. Assoc. v. Louisburg, 21 Ill. 511.

Fire Department of Milwaukee v. Helfenstein, 16 Wis. 142.

IX.

Right to fix rates.

This is one of the vital questions in the case now under consideration. In an exhaustive note to Winchester & L. Turnpike Road Co. v. Croxton, 33 L. R. A. 177, is found a collection of authorities upon the power of the legislature to fix rates and prices in various kinds of business. We can not do better than to cite this note and to a limited extent quote therefrom. This note is in part as follows:

1.—THE GENERAL DOCTRINE.

"The leading case, and the one that has established the law on the subject of legislative power to regulate charges or rates that may be lawfully demanded in a business affected with a public interest, is that of Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. It laid down the doctrine that private property is subject to public regulation when it is devoted to a public use.

"Justice FIELD, who dissented in Munn v. Illinois, said, in Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. Ed. 377, as to property affected with a public use:

> " 'There have been differences of opinion among judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn v. Illinois, 94 U. S. 113, 126, 139, 146, 24 L. Ed. 77, 84, 88, 91, but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression.'

" 'The good sense as well as the law of the subject,' says Lord ELLENBOROUGH, C. J., in Allnutt v. Lord Hale (*De Portibus Maris*, 1 Hargraves, Law Tracts, 78), to the effect that where private property is affected with a public interest it ceases to be *juris privati* only, and he says that this principle attaches if there exists in the place and for the commodity in question a virtual monopoly. This doctrine was laid down in deciding that in case of such a virtual monopoly a warehouseman was limited to reasonable charges. It was not a question of the power of parliament to limit such charges, and indeed of this there could be no question, but merely the power of the court to limit them by application of this doctrine. If the courts can of themselves establish such a limitation of the amount to be charged in business dealings, the power of the legislature to do so must surely exist.

"That a mere common-law regulation of trade or business may be changed by statute is asserted in Munn v. Ill., but it is too obvious to require any authority. It is said in that case: 'A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. . . . The great

office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to the old one.'

"Since state legislatures have sovereign power of legislation except as restrained by constitutions, it is plain that any limitations upon their power to regulate prices or business must be found in the provisions of the constitutions. Neither federal nor state constitution takes away the police power from the legislature; and it is under this power that the regulation of business is made. A regulation which does not violate any specific constitutional provision like that against impairing the obligation of contracts must be upheld unless it violates such broad and comprehensive guarantees as those of equality and due process of law. As to these, see further infra.

"Unless a calling affects the public interest, or private property is employed in a manner which directly affects the body of the people, there is no motive for interference on the part of the legislature, says the court in Mobile v. Yuille, 3 Ala. 137, 36 Am. Dec. 441.

"'Property becomes clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large,' says Chief Justice WAITE, speaking for the court in Munn v. Illinois. While this language may seem somewhat indefinite and vague, it must be admitted that it is not more so than any definition that can be made of negligence or nuisance, or of anything else that is to be determined by the degree or extent of its existence or operation.

"Persons who have devoted their property to a use in which the public has an interest are declared by the court in Laurel Fork & S. H. R. Co. v. West Virginia Transp. Co., 25 W. Va. 324, to be *quasi* public officers, and common carriers, hackmen, bakers, millers, wharfingers, and innkeepers are given as illustrations of this class. As to the particular kinds of business subject to these regulations see infra, III."

II.—WHETHER LIMITED TO MONOPOLIES OR NOT.

"The power of a court, without the aid of any statute, to limit warehouse charges, when a virtual monopoly exists, is referred to above in the case of Allnutt v. Inglis, 12 East, 527. The power of the legislature to limit charges in similar cases is quite fully established in the cases below. An important and difficult question is as to the limitation of this power to cases of monopoly.

"The rates regulated in Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, were for the storage of grain in warehouses at Chicago and other places in the state of Illinois having less

than 100,000 inhabitants, when grain was stored in bulk in such warehouses and that of different owners mixed together or stored in such manner that the identity of the different lots or parcels could not be accurately preserved.

"That these elevators might be a virtual monopoly was asserted in the opinion of the court, although there were fourteen warehouses in Chicago, owned by about thirty persons but controlled by nine business firms.

"The power of the legislature to regulate charges for the use of property and the rendition of services connected therewith is declared, in People v. Budd, 117 N. Y. 1, 5 L. R. A. 559, to be not limited to cases in which the owner has a legal monopoly or some special governmental privileges or protection, but to extend to certain other kinds of business which hold such peculiar relation to the public interest that there is superinduced upon them the right of public regulation. In that case a statute fixing a maximum charge for elevating grain is held constitutional, because the elevator business constituted a virtual monopoly and was created and made possible by the canal business, and also because of the nature and extent of the business and its relation to the prosperity and welfare of the state.

"So the Supreme Court of the United States in affirming that decision and holding that the business of elevating grain is charged with a public interest analogous to that of a common carrier and to that of a warehouseman, said, 'In the actual state of the business the passage of the grain to the city of New York and other places on the seaboard would, without the use of elevators, be practically impossible. The elevator at Buffalo is a link in the chain of transportation to the seaboard, and the elevator in the harbor of New York is a like link in the transportation abroad by sea. The charges made by the elevator influence the price of grain at the point of destination on the seaboard, and that influence extends to the price of grain at the places abroad to which it goes. The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good.' Budd v. New York, 143 U. S. 517, 36 L. Ed. 247.

"In another New York case it is said: 'Property used in handling and storing the great staple articles of food and the necessaries of life, by which use a tax or toll is levied thereon, ceases, while applied to such use, to be *juris privati* only, and becomes affected with a public interest, and such use may be regulated by the legislature without encroaching upon any of the constitutional rights of the owner.' Re Annon, 50 Hun 415, affirmed *sub nom*, People, Annan v. Walsh, 26 N. Y. S. R. 554.

"In describing the situation of a water company whose rates held subject to regulation in Spring Valley Waterworks v.

Schottler, 110 U. S. 347, 28 L. Ed. 173, it is described as having 'a virtual monopoly of trade in water at a particular place.'

"The existence of a virtual monopoly to justify the decisions in Munn v. Illinois and People v. Budd did not exist in the case of Brass v. North Dakota, in which the regulation of elevator charges was again upheld. It is said in the dissenting opinion of Mr. Justice BREWER that along the line of a single railroad within the limits of the state there were about 600 of these elevators owned and operated by over 125 different persons, and varying in cost of construction from $500 to $5000, and that any person could, at a cost of less than $200, provide himself with all facilities for storing and shipping the entire product of an ordinary farm. He says: 'Obviously elevators along the line of that road were as plentiful as other institutions of industry, and as easily and cheaply constructed, and therefore savoring no more of monopoly.' Brass v. North Dakota, Stoeser, 153 U. S. 391, 38 L. Ed. 757, affirming State, Stoeser v. Brass, 2 N. D. 482.

"A fair interpretation of the above cases does not limit the doctrine to cases of monopoly or virtual monopoly but extends it to all cases in which the property is affected with a public interest to such a degree that its regulation is demanded by the public welfare. It is difficult, if not impossible, to find any legitimate test of this except the judgment of the legislature unless the legislative function of declaring public policy is to be transferred to the courts."

This note then cites a large number of authorities to show that the legislatures of these states have power to fix rates and charges for the services of:

a.—Elevators and warehouses.
b.—Carriers.
1.—Such as railroads.
2.—Street railways.
3.—Canals.
4.—Ferries.
c.—Toll roads.
d.—Bridges.
e.—Wharves.
f.—Telegraphs.
g.—Telephones.
h.—Gas.
i.—Bread.
j.—Water.
k.—Mills.
l.—Personal service.
m.—Care or salvage of logs.

X.

Public interest and public use.

In the oral argument of the demurrer, the complainants' counsel seem to rest their case solely upon an alleged distinction between the terms "public interest" and "public use," and confidently assert that the state has no power to regulate prices in any business which is not impressed with a public *use* as well as a public interest. By the term "public use" is meant that the public has the right to demand service of the business sought to be regulated.

The argument confounds a frequent attribute of a public business with the reason for any calling becoming public in its nature and character. It is a most startling example of the fallacy *petitio principii* to assert, as does the complainant, that: The state can regulate prices only where the public can compel service. The public can not compel insurance from complainant. Therefore, insurance prices can not be regulated.

Neither of the above premises are proved, while both must be before the argument is of any validity. It is quite clear that if the right to demand service is a necessary attribute of a business subject to price regulation, and insurance shall be determined to be subject to such regulation, that any one can demand and receive such insurance. The argument adds a quality to a "public use" when once established, but is absolutely no assistance in determining whether the business in question is such a business. Indeed a fair one-half of all the public business cases in the books have occurred over the very question as to whether the public could compel service. Will it be argued in such a case that the decisive rule of evidence would be whether the public could regulate prices?

The truth is that the right to regulate prices as well as the right to demand service are each evidence of a public business, but neither is necessary to make a vocation subject to public control. It is also true that the cases show complainants' contention to be long ago "exploded" doctrine.

In the great case of Budd v. New York, 143 U. S. 517, this argument was the basis of the dissenting opinion of Mr. Justice BREWER: In this opinion he said:

"The vice of the doctrine is that it places a public interest in the use of property upon the same basis as a public use of property. Property is devoted to a public use when and only when the use is one which the public in its original capacity, to wit:

the state, has a right to create and maintain, and therefore one which all the public have a right to demand and share in."

This view was overruled by the majority opinion of the court, the doctrine of the Munn case commented on and fully upheld. The court reannounced the holding of the Munn case to be—

"That the business in question was one in which the whole public had a positive interest, that the statute of Illinois specially extended the laws so as to meet the new development of commercial progress; that there was no attempt to compel the owners of the warehouses to grant the public an interest in their property, *but to declare their obligations, if they used it in that particular manner.*"

In Freund's Police Power, sec. 378, we find the following language:

"Where there is neither legal nor actual monopoly, the question of the power to regulate charges presents great difficulties. It seems impossible to deny the constitutional power in the face of such a decision as Brass v. North Dakota, and of the well-established limitation of rates of interest, and there seems, moreover, to be no case in which a reasonable regulation of charges has been declared unconstitutional on the ground that the legislature does not possess such power. . . .

"A possible solution of the difficulty may be found in the application of the principle of equality. Conceding that it is within the general scope of the police power to prevent unreasonable charges as constituting a form of economic oppression and, as a means of prevention, to fix rates, yet it is clear that a systematic regulation of charges of all commodities and services is not within the range of practical legislative policy. All such legislation will necessarily apply to particular classes of business. Under the principle of equality the classes so singled out *should have some special relation to the possibility of oppression.* The justification for regulating charges in some particular business would usually be that it constitutes *a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation. Upon this theory it is possible to account for existing legislation without conceding legislative power with regard to any and all commodities which it may choose to select, and on the other hand to allow for new applications of this power, while subjecting them to an efficient judicial control which will undoubtedly be claimed and exercised.* There will thus be an adequate safeguard against arbitrary class legislation in the matter of regulation of charges. All legislation in this matter

will, moreover, be subject to the principle of resonableness of the rate fixed—a principle which has become established in a series of important decisions."

The real turning point in the Munn case will be discussed in connection with the Budd case later in this brief.

We now desire to call attention of the court to the insistent invitation of the complainants for us to point out some business in which it was conceded that the public had the right to regulate rates without the public being given the right to compel service to all.

It takes only a cursory examination along the line of this suggestion to show that the rule contended for by complainants is utterly without foundation. The illustration closest to the one under consideration, in which the public exercises the right of fixing rates through the legislature, and yet denies to the public the right to demand service generally, is that of life insurance. The business is administered by a public bureau in every state of the Union, the contract between the insured and the insurer is supervised by a public officer, in Kansas for more than twenty years, and in every state of the Union the law requires that policies of life insurance shall not be written at less than the legal reserve computed according to the American mortality table at certain rates of interest (in Kansas 3½ per cent). In the state of New York since the Armstrong investigation, the law actually limits the amount of new business that may be taken by any company, and the regulation extends still further by limiting the amount that may be paid to agents for securing new business. See People v. Formosa, 61 Hun 272, 27 Am. St. Rep. 612. Also the very late case of Boswell v. Security Mutual Life Insurance Co., 193 N. Y. 465, 86 N. E. 532.

Another illustration of public regulation without "public use" is that of the usury laws. This was suggested by the court on oral argument. The complainants attempt to explain this by asserting that all right to contract for interest is statutory, and that the state having regulated the right to contract for the whole it may limit the right to take only a part of the whole. This is also exploded doctrine and at best only emphasizes the fact that interest and usury are subjects wholly within the public control. It matters not that the right to take interest sounded originally in statute. The constitution of the United

States guaranteed the right to contract freely between all citizens of the nation upon all subjects, and included interest or hire for the use of money as well as other things. The limitation of free contract exists only in the police power of the state to control contracts for the public interest. But as stated above in reference to the doctrine of public use, the relation of the usury laws to the state's power of control has been settled in the Budd case. The court of appeals of New York (117 N. Y. 1), in its opinion, which was commented upon favorably and fully approved by the supreme court of the United States, says:

"It seems to us that speculative, if not fanciful reasons have been assigned to account for the right of legislative regulation in this and other cases. . . . That the right to regulate the interest upon the use of money sprung from the fact that taking interest was originally illegal at common law and that where the right was granted by statute it was taken subject to regulation by law. . . . The reason assigned for the right to regulate interest takes no account of the fact that the prohibition by the ancient common law to take interest at all was a regulation, and this manifestly did not rest upon any benefit conferred on the lenders of money. It was a regulation springing from a supposed public interest, and was peculiarly oppressive on a certain class. A law prohibiting the taking of interest on the use of money would now be deemed a violation of a right of property. But the material point is that the prohibition, as well as the regulation, of interest, was based upon public policy, and the present conceded right of regulation does not have its foundation in any grant or privilege conferred by the sovereign. The attempts made to place the right of public regulation in these cases upon the ground of special privilege conferred by the public on those affected can not, we think, be supported."

Upon this subject in Freund's Police Power, sec. 304, we find the following:

"Usury legislation is undeniably a species of regulation of charges, and, upon principle, open to the constitutional doubts which have been felt with regard to this form of legislative control in general. Loaning money (unless by banks or pawnbrokers) is neither a business affected with a public interest, nor one particularly concerning safety or morals. That the legislation originated as a relief from absolute prohibition, and was in the beginning in the nature of a license, is an inadequate theoretical justification, since antiquated and exploded theories should not be allowed to control constitutional princi-

ples. But the legislation is so firmly established that if regulation of charges is regarded as a valid form of exercise of the police power subject to the principle of equality, the singling out of that particular class of charges may at least be justified on the ground of historical tradition."

We think these citations effectually dispose of the attempt of complainants to explain away the regulation of interest charges by the state where the public has any use in the business. Indeed, so generally has the banking business come to be considered a public business that rates of exchange, interest on deposit certificates, savings accounts, public money accounts, and many other things would be clearly subject to public control. Many of the reasons given for holding banking a public business, as well as seen from the cases hereafter cited, apply to insurance.

Among other instances where charges may be regulated by the public without compelling the person whose rates are regulated to furnish service to all who apply, may be mentioned the care and salvage of logs. See note in the 33 L. R. A. 182 cited herein. While it is true that boom companies for logging may partake to some degree of transportation companies, the salvage of logs lost by water or wind is another matter, and statutes in the lumber states usually provide that only so much may be charged by those who take and care for logs lost by the owners. See West Branch Lumbermen's Exchange v. Fisher, 150 Pa. 475.

"The legislature has the power to fix the amount of salvage upon logs which get into the river without the fault of the owner." West Branch Lumbermen's Exchange v. Fisher, 150 Pa. 475.

In the above Pennsylvania case the court says:

"They may fix it at 6 cents per log, as under the act of 1812 and its supplement of 1853, or at a reasonable compensation, as under the act of 1855, or at 50 cents per thousand feet, board measure, as under act of 1862, or at 50 cents per log, as under the act of 1866. The question is, 'What has the legislature provided?

"As to logs lodged upon islands, it is held in this case that the reasonable compensation given by the Pennsylvania act of 1855 is all the salvor can claim.

"In Craig v. Kline, 65 Pa. 399, 3 Am. Rep. 636, the court considered a statute providing that the owner of logs must pay

the captor as salvage 50 cents per log to prevent forfeiture, but the case turned on the question of forfeiture rather than the amount of compensation.

"The sum of 25 cents for each log cast by wind and tide upon any shore bordering upon Chesapeake bay and its tributaries is fixed by the Maryland Code, art. 34, as the amount which the owner must pay before removing the log. This statute is held in Henry v. Roberts, 50 Fed. Rep. 902, to be a salutary exercise of the state police power.

"So in Genesee Fork Imp. Co. v. Ives, 144 Pa. 114, 13 L. R. A. 427, it is said that so long as the company keeps within the discretionary limit fixed by the statute its right to collect the tolls can not be defeated nor is discretion to fix the amount questioned. Other cases have been to the same effect but in these the legislative power was not questioned." (33 L. R. A. 182.)

It is quite clear from the nature of this business that no one could be compelled to furnish service and that the right to regulate springs from a public interest in preventing extortionate charges. The nature of the service is similar to that performed by the person who takes up a stray in the agricultural states. The charges in such cases are regulated by statute to prevent extortionate charges against the owner for the taking up, advertising and keeping of the stray.

Still another illustration of public rate regulation without public use is the right of cities to regulate the price and weight of bread loaves. In the oral argument, this right was denied by complainant, and it was asserted that the case of Mayor of Mobile v. Yuille, 3 Ala. 137 (36 Am. Dec. 441), did not sustain the power to fix prices. The case shows the contrary. The charter act conferred direct authority to fix prices and weights. The rule in question provided that: "All bread should be made of good and wholesome flour and of such weight as shall be from time to time prescribed; the loaves to be of the value of twelve and one-half and six and one-fourth cents." The court uses the term "assize" throughout its opinion. Assize includes price as well as weight. A regulation of weights without a regulation of price would be useless. No one can read this opinion without knowing that the court fully sustains the right of the city to fix prices as well as weights.

But it is useless to multiply these illustrations. As stated in the beginning of this part of the brief, the argument is not logical; it proceeds upon the theory of "coincidence," and such

arguments never prove anything. It will be more profitable to look to the principles upon which a business may be declared to be a public business, subject to rate regulation. In doing so we will attempt a review of two or three of the great cases on this subject and to point out the real principle upon which they were decided. And it will clearly appear from them that claimants' theory of the necessity of "public use" to justify rate regulation has not only been expressly overruled by the courts, but in reality the complainants have, to use a homely phrase, taken "the wrong pig by the ear."

The cases more nearly justify the conclusion that it is where the business sought to be regulated can compel the patronage of the public that the right of the public to fix rates exists, rather than in cases where the public may demand and enforce service. *The element of oppression either from monopoly or near monopoly, or from some other reason, is generally the moving cause and justification for rate regulation.*

The business of hotels, theaters, and play-houses are ones in which the public has the freest hand in compelling equal rights and service, yet it is very doubtful if the public has the right to fix the price of hotel bills or theater tickets. The same principle applies as to the professions and personal services of a public nature. The public may compel the service within certain limits, but can not fix rates unless special reasons appear which would justify rate fixing in any business.

Referring again to the Munn case, we find the real rule by which the business of elevating grain was determined to be subject to rate regulation was the following:

"Certainly, if any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the constitution of Illinois or this statute, *but it is by the facts.*

. . . . . .

"But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised, if there are no statutory regulations upon the subject, the courts must determine what is reasonable. *The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied. In fact, the common-law rule, which requires the charge to be reasonable, is itself a regulation as to price. Without it the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.*"

Monopoly was one of the greatest features of the Munn case, but in the case of Brass v. North Dakota, Stoeser, 153 U. S. 391, the right of rate regulation was placed on entirely different grounds.

In many ways People v. Budd is a more important case than the Munn case. In the opinion in the state court (117 N. Y. 1) and in the supreme court, the Munn case is fully vindicated, and even more complete and comprehensive rules relating to the determination of what constitutes public business are considered and pointed out. It is of especial importance in regard to the consideration of the effect of a "public use" upon the right to regulate rates. In the first place, it may be observed that the service for which rates were prescribed by the New York statute extended much further than mere elevator or warehouse service. The statute fixed the price for the use of a steam shovel in transferring grain from one vessel to another, also fixed the price at five-eighths of one cent a bushel for trimming and shoveling to the leg of the elevator. This elevator was simply a movable apparatus to transfer grain from one vessel to another. It was also provided that the person transferring grain by means of this steam shovel or elevator could compel the person served to pay only the actual cost of the labor employed in shoveling and attending to the services. *In this way the very price of day labor was sought to be regulated, and that separate and apart from any relation to warehousing or transferring grain in its usual sense.* It is quite evident that a laborer could not be required to serve, and very doubtful indeed if the owner of one of these movable elevators or transferring apparatus could be compelled to grant the service to any one requiring it. What the court held was that where a steamship or canal boat was served, that the public had a right to require the service to be done at a certain reasonable price.

Continuing from the quotation made above concerning usury, the court in its opinion said:

"The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation. We rest the power of the legislature to control and regulate elevator charges on the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the canal, creating the business and making it possible, the interest to trade and commerce, the relation of the business to the pros-

perity and welfare of the state, and the practice of legislation in analogous cases. These circumstances collectively create an exceptional case, and justify legislative regulation."

We call especial attention of the court to the opinion of the supreme court of the United States in this case, Budd v. New York, 143 U. S. 517. From the opinion we quote as follows:

"It is claimed, on behalf of Budd, that the statute of the state of New York is unconstitutional, because contrary to the provisions of section 1 of the 14th amendment to the constitution of the United States, in depriving the citizen of his property without due process of law; that it is unconstitutional in fixing a maximum charge for elevating, receiving, weighing and discharging grain by means of floating and stationary elevators and warehouses at five-eighths of one cent a bushel, and *in forbidding the citizen to make any profit upon the use of his property or labor; and that the police power of the state extends only to property or business which is devoted by its owner to the public, by a grant to the public of a right to demand its use.* It is claimed on behalf of Annan and Pinto that floating and stationary elevators in the port of New York are private property, not affected with any public interest, and not subject to the regulation of rates.

" 'Trimming' in the canal boat, spoken of in the statute, is shoveling the grain from one place to another, and is done by longshoremen with scoops or shovels; and 'trimming' the ship's cargo when loading is stowing it and securing it for the voyage. (250.)

"In the Budd and Pinto cases, the elevator was a stationary one on land; and in the Annan case, it was a floating elevator. In the Budd case, the court of appeals held that the words 'actual cost,' used in the statute, were intended to exclude any charge by the elevator, beyond the sum specified, for the use of its machinery in shoveling, and the ordinary expenses of operating it, and to confine the charge to the actual cost of the outside labor required for trimming and bringing the grain to the leg of the elevator; and that the purpose of the statute could be easily evaded and defeated if the elevator owner were permitted to separate the services and charge for the use of the steam shovel any sum which might be agreed upon between him and the shovelers' union, and thereby, under color of charging for the use of his steam shovel, exact from the carrier a sum for elevating beyond the rate fixed therefor by the statute. (251.)

"The court of appeals said that, in view of the foregoing exceptional circumstances, the business of elevating grain was affected with a public interest, within the language of Lord Chief Justice HALE, in his treatise *De Portibus Maris* (Harg.

Law Tracts, 78); that the case fell within the principle which permitted the legislature to regulate the business of common carriers, ferrymen and hackmen, and interest on the use of money; that the underlying principle was, that business of certain kinds holds such a peculiar relation to the public interest that there is superinduced upon it the right of public regulation; and that the court rested the power of the legislature to control and regulate elevator charges upon the nature and extent of the business, the existence of a virtual monopoly, the benefit derived from the Erie canal's creating the business and making it possible, the interest to trade and commerce, the relation of the business to the property and welfare of the state, and the practice of legislation in analogous cases, collectively creating an exceptional case, and justifying legislative regulation.

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"We regard these views, which we have referred to as announced by the court of appeals of New York, so far as they support the validity of the statute in question, as sound and just. (252.)

"We must regard the principle maintained in Munn v. Illinois as firmly established; and we think it covers the present cases, in respect to the charge for elevating, receiving, weighing and discharging the grain, *as well as in respect to the charge for trimming and shoveling to the leg of the elevator when loading, and trimming the cargo when loaded.* If the shovelers or scoopers chose, they might do the *shoveling by hand, or might use a steam shovel.* A steam shovel is owned by the elevator owner, and the power for operating it is furnished by the engine of the elevator; and if the scooper uses the steam shovel, he pays the elevator owner for the use of it.

. . . . . .

"We are of the opinion that the act of the legislature of New York is not contrary to the 14th amendment to the constitution of the United States, and does not deprive the citizen of his property without due process of law; that the act, in fixing the maximum charges which it specifies, is not unconstitutional, *nor is it so in limiting the charge for shoveling to the actual cost thereof;* and that it is a proper exercise of the police power of the state." (255-6.)

The court will observe the distinction sought to be secured by the dissenting opinion of Justice BREWER in this case hereinafter referred to.

We desire also to call the attention of the court to quite a late case in which the question of rate regulation and public use was considered at length by the supreme court of New Jersey relative to fire insurance rates. It is of more than

usual interest because dealing with the very question under consideration here. Of this case The Central Law Journal of July 30th, 1909, says editorially:

"A recent opinion by Justice GARRISON, of the New Jersey court of errors and appeals, ought to receive the careful reading of every attorney-general especially in this country. See McCarty, Atty-Gen. v. Firemen's Ins. Co., 73 Atl. 80.

. . . . . .

"It has been often urged that the power to exercise the right of eminent domain was in the nature of a test as to whether or not a public interest attached, and that such businesses should serve all alike. The New Jersey court said: 'To confuse these incidents and indicia with the fundamental relation out of which they arose, or to say that such fundamental relation between the use of private property and the public interest therein is a thing of the past, is to take a totally illogical position, the acceptance of which would disarm the courts of to-day of defensive weapons of which the courts stand in more need now than in the day when Lord Chief Justice HALE wrote his treatise, *De Portibus Maris*.'"

This was a case brought by the attorney-general of New Jersey to oust the Firemen's Insurance Company and other corporations from transacting business in the state, because of an agreement entered into by these companies to fix insurance rates. There was no statute in New Jersey forbidding such a combination or providing for the ouster of companies because of such acts. There was no statute authorizing the attorney-general to bring such an action. The suit, therefore, differed from ordinary antitrust cases, such as State v. Phipps, supra, in the Kansas court, and the plaintiff's case rested solely upon the question as to whether the insurance companies were engaged in a public business in which the state had a right to exact reasonable prices, and therefore the attorney-general, as the general law officer of the state, had the right to maintain the suit in the interest of the public. The higher court reversed the judgment of the lower court and held in favor of the state upon each of these questions, and in doing so considered every complaint now advanced by the complainants in their attack upon the insurance rating law now under consideration. We quote from the opinion of the court on this question:

"Upon this branch of the present inquiry, therefore, the pertinent questions are:

"(1) Are the defendants engaged in a business affected with a public interest?

"(2) Is the contract into which they have entered one that is *ultra vires* such corporations? and

"(3) Does such contract tend to affect such public interest injuriously?

"The first question, and that upon the answer to which this branch of the case virtually turns, is whether or not the business of fire insurance as carried on in this state is a business affected with a public interest within the meaning of the rule enunciated in Attorney-general v. Central Railroad Company. The answer to this question does not depend, as counsel for the respondents argue, upon whether the defendants were expressly created as public agents, or whether the state has expressly charged them with the performance of a public duty, or has to that end clothed them with monopolistic privileges, or granted to them its right of eminent domain, or required *that they insure the property of all citizens alike. These are indicia by which the existence of 'a public interest' may be readily discerned, but, so far from 'the public interest' arising* out of these incidents, the fundamental fact is that they arise out of such public interest. In natural course the public interest first arose, and afterwards, and because of such interest, all of these incidents were added unto it. In their inception all public callings were private ones, whose history has consisted in the evolution of a public character and of the incidents that they now possess. 'First the blade, then the ear, after that the full corn in the ear.'

. . . . . .

"One significance of this statement of the law of property is that it speaks in the present tense, viz., 'property does become clothed with a public interest,' not did become so clothed once upon a time. Another is its recognition of the fundamental law that public interest arises essentially from the uses to which a man puts his property, and not from a force *ab extra;* and yet another is that, knowing this to be the law, men engage in certain callings, knowing that the business they so embark in will, if success attend it, become affected with a public interest. 'They entered upon their business and provided the means to carry it on subject to this condition,' he says; and, speaking to the point that it was of no moment that a direct precedent could not be found, Chief Justice WAITE says, 'It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance,' and, reaching the conclusion that the public interest was affected, he adds, 'It presents, therefore, a case for the application of a long-known and well-established principle in social science.' . . . There is no attempt to compel

these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner.

. . . . . .

"Upon this point Munn v. Illinois, as was said by Chief Justice WAITE, introduced no novel doctrine. What it did was to call attention to the fundamental relation that exists between the use of private property and the creation of a public interest in such use, and its chief value as a contribution to jurisprudence was that it pointed out clearly that in the determination of such a relation the underlying question was not what the state had done to impress a public interest upon a business, but what the owners and operators of such business had done to draw to, and thus clothe themselves with, a public interest; for in Munn v. Illinois the state had done absolutely nothing. The vast importance of the maintenance of this point of view by the courts of this country must be conceded when we consider that to an unprecedented extent business enterprises are launched the success of which depends upon the extent to which the public can be attracted to them and constrained to lean upon them. Public support of this character is essential to the success of these enterprises, and hence is from their inception the desideratum of their promoters. When, therefore, success along these lines has been attained, it brings with it duties to the public, whose interests are involved, of precisely the same nature as if such duties had been imposed by public law upon such enterprises at their inception.

. . . . . .

"When the first waterman held out to his neighbors a means of ferriage, other than in their separate boats, and when the first teamster undertook to carry families and their produce to the market town, the foundation of the modern law of common carriage was laid, and, as success attended these undertakings by their successful appeal to the public, a public interest in them arose which in time was recognized and acted upon by legislatures and by courts alike, the power of eminent domain and other privileges being granted in order that such public interest might be the better served; the duty of serving all alike, and of refraining from excessive charges by combination or otherwise, being imposed that such public interest might be the better safeguarded. *To confuse, therefore, these incidents and indicia with the fundamental relation out of which they arose, or to say that such fundamental relation between the use of private property and the public interest therein is a thing of the past, and that such relation is not just as sound and fruitful now as then, is to take a totally illogical position, the acceptance of which would disarm the courts of to-day of defensive weapons of which the public stands in more*

need now than it did then. It is therefore a shallow argument to say that a court can not restrain corporations from ultra vires *acts injurious to the public because such corporations have not been given the right of eminent domain, or because they have not been compelled to insure all of the property of all of the people. When the public interest will be furthered by such power or by such duty they will come into existence, but not otherwise. What, for instance, would a fire insurance company do with the power of eminent domain, or how would law-abiding insurers be benefited by requiring these companies to insure the property of incendiaries? The same law, both as to the attainment of a public interest and as to the incidents that shall attach to it, is operative now as in the past, and the same history still repeats itself whenever a business or calling that was either unknown to the common law, or of no public import then, insinuates itself into modern business methods, so that it becomes a matter in which the public is vitally concerned.* Of this there can be no more apt an example than the business of fire insurance as carried on by these defendants under modern conditions and under the laws of this state. If such business were still in the hands of individual underwriters, unaffected by state regulation, and confined to the writing of policies on the dwellings of prudent householders and on the stores of careful merchants, a great deal might be said in favor of the view that no public interest had attached to the making of these private contracts. We can not, however, close our eyes to the fact that, by the enormous extension of this business, by its concentration in the hands of immense corporations, by state regulations that amount to privileges, and by its practically universal employment as a collateral security for debts, the business has become one in which the interest of the public is directly involved, certainly as much so as it is in the warehousing of grain. The collateral security of mortgage debts would alone suffice to attach a public interest to the business in question, since it vitally concerns credit as a factor in modern business.

"Whatever concerns business credit *ex necessitate* touches a matter in which the public is directly interested. The impairment or embarrassment of business credit affects immediately, not only the demand for money and the volume of business transacted, but also the inauguration of new enterprises, the employment of people, and the payment of the wages they would otherwise receive and spend, and thus ramifies in its effects from the greatest banking houses, through the homes of the unemployed, or the badly paid, to the smallest retail shops. By the introduction and perfection of title insurance a practically new commercial utility has been imparted to real property, which, under such new conditions, performs a recognized service in the immediate obtaining of

credit for commercial needs or in business emergencies. The collateral indemnification of credit thus obtained has become one of the chief, if not the chief, business of modern fire insurance, and I doubt whether within twenty years past a mortgage on improved property has been given that did not covenant for such insurance and for its maintenance under the penalty of immediate foreclosure. The public, greatly to the benefit of the insurance business, has become educated to this system and to lean upon it and to shape their business ventures in reliance upon it. Such education and such reliance, which were of course beneficial, and properly so, to the insurance companies, have so entered into the woof and warp of general public business that nothing that can be conceived of would produce greater disturbance or profounder catastrophe than the cancellation of such policies or the withholding of such insurance. It seems to me that it is impossible to say that by its very growth and success the business of fire insurance has not become affected with a public interest within the principle of Munn v. Illinois. That it is deemed for legislative purposes to be so affected is evident from the voluminous code enacted in this state for its regulation in the interest of the public. (P. L. 1902, pp. 407-447.) It is pertinent at this point to ask why the state should enact a regulative code for the protection of a public interest that does not exist. Moreover, some of the provisions of this code, while in form regulations imposed upon insurance companies, amount practically to privileges accorded to them. Indeed, it is by reason of the privileges thus enjoyed by foreign companies that the present combination is rendered feasible. In such case—*i. e.*, where foreign corporations that have been accorded the privilege of transacting their legitimate business in this state use such privilege to engage with our domestic companies in a compact inimical to the interests of the people—it would be a salutary, and I am inclined to think a sound, rule of law that would estop such foreign corporations to deny that they were enjoying such a privilege from the state as made them amenable in the premises to its courts of equity. A state that had granted such a privilege should, it seems to me, be entitled, with a reasonable expectation of being heard, to apply to its own courts for preventive relief based upon the abuse of the privilege it had granted. Be this as it may, we think that it is impossible for the unbiased mind to reach the conclusion that the business of fire insurance as now conducted in this state by corporations created, licensed and regulated by the state is not a business affected with a public interest, but that the storage of grain by private individuals is so affected. Yet such is the conclusion we reach, unless, so far as in us lies, we overturn the decision of the federal supreme court in Munn v. Illinois, a decision that has been followed in cases so numerous

that their citation from state reports would be superfluous, and of which Mr. Justice HARLAN, speaking at a later period, said, 'The doctrines of Munn v. Illinois have never been modified by this court,' *i. e.*, the supreme court of the United States. (Civil Rights Cases, 109 U. S. 62, 3 Sup. Ct. 18, 27 L. Ed. 835.)

"The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interests of the public, and that such public interest has been recognized as a subsisting one by the legislature of this state, and that in point of law the business of the defendants is affected with a public interest."

We think this case is fully sustained by the authorities, and is the strongest support possible of our position in this case. The court must specifically refuse to follow the doctrine announced in the case or else uphold the statute in question.

XI.

Fire underwriters' associations.

We desire to call the court's attention to the fact that associations having all the powers of fixing fire insurance rates have been authorized by the legislatures of numerous states of the Union and generally upheld and recognized by the courts as valid. The city of Chicago has a board of underwriters chartered by an act of the legislature of the state of Illinois, and this board is authorized to fix fire insurance rates and maintain uniformity thereof within the city of Chicago. Similar boards exist in almost every densely populated city of the Union. These boards are defended upon the theory that they are necessary to protect the city against fire loss and conflagrations.

See N. Y. Bd. of Underwriters v. Higgins, 114 N. Y. Sup. 506.

Firemen's Fund Ins. Co. v. Helner, 49 So. 297.

Continental Co. v. Parks, 142 Ala. 650, 39 So. 204.

Referring to what is said heretofore concerning the right of the state to regulate fire insurance rates because of their relation to fire hazard, we call attention of the court to two expressions of the supreme court of the United States upon this question. In the first of these cases, Orient Ins. Co. v. Daggs, 172 U. S. 565, the court said:

"Risk, then, can only come from the failure to observe care—that care which it might be supposed, without any prompt-

ing from the law, underwriters would observe, and which, if observed, would make their policies true contracts of assurance—not seemingly so, but really so; not only when premiums are paying, but when loss is to be paid. The state surely has the power to determine that this result is desirable, and to accomplish it even by a limitation of the right of contract claimed by plaintiff in error."

In the second of these cases, Farmers' & M. Ins. Co. v. Dobney, 189 U. S. 301, the court said:

"Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the state. If, in regulating and classifying insurance contracts, the legislature took the foregoing considerations into view and provided for them, we can not say that in doing so it acted arbitrarily and wholly without reason."

In still another case, the supreme court of the United States, in Barbier v. Connelly, 113 U. S. 27-8, used this language:

"Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good."

We desire that the court keep these authoritative statements of the supreme court in mind in consideration of what is said hereafter concerning the right of the state by the statute in question to protect the community against loss by fire.

Complainant's right to be heard.

We insist that the demurrer should be sustained for another reason which has not been urged at length in this brief, but is decisive of the questions presented by this demurrer. We refer to the fact that the complainant does not complain of the unreasonableness of the rates prescribed by the superintendent of insurance. It is specially alleged in the bill that no complaint is made upon these matters. The federal courts have jurisdiction to interfere only where a "federal right is denied." It is useless to restate the authorities which were set forth and commented upon at great length in the bank guaranty case upon this matter. We desire, however, to call attention of the

court to the holding of the supreme court of the United States in both the Munn case and the Budd case, upon this proposition. In the Budd case the court said:

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the legislature was unreasonable."

This is decisive of the case in question and absolutely prevents the complainant from receiving relief in this suit.

XII.

Reasonable use of police power.

It appears from the foregoing that the regulation of fire insurance business is one of the legitimate police powers of the state. The only question which remains is, Does the fixing of rates by the state amount to an unreasonable use of that power? It is hard to see, if the power to fix rates for elevators and mills, tolls and charges of the different kinds of business named in the foregoing authorities can be sustained, why the legislature can not also be sustained if it shall deem it necessary to fix a maximum and minimum rate at which all fire insurance in the state shall be written.

As stated before, this question involves in a way a consideration of the very nature of insurance. It has already been shown that the government itself in most of the countries of the world has exercised and still exercises the right to establish a government monopoly in the conduct of insurance. There are no doubt reasons sounding in the police power itself which support the wisdom of this policy, and if there be such reasons, they are equally applicable to sustain the rights of the state in fixing rates. The only limitations upon that power must be found in the constitution, and as the federal constitution does not seek to limit the exercise of the police power on the part of the state, the question depends upon whether the fixing of such rates can be justified as an exercise of that power.

The rule drawn from the authorities cited herein is that the vendor as an individual is limited in his right to fix the price of his commodity by the relation of his transaction to the

common good. If the situation warrants, the government is empowered to impose a reasonable limit on price to promote the welfare of the community.

Turning now to a brief consideration of the subject from this standpoint, it must be conceded that the legislature may consider the protection of the citizen from fraudulent and improvident practices in insurance, the oppression of unreasonably high and unequal rates exacted by combinations of insurance companies, or a monopoly, and also whether the general theory of insurance as conducted by private individuals and companies promotes public safety, prevents unreasonable losses from fires and is conducive to the general welfare of the community in business transactions. The legislature may well decree that such business may be conducted in a way which will tend to the proper education of its citizens in each and all of these regards.

It is to be noted that the statute does not give the superintendent authority to fix a rate; it only empowers him to approve or reject rates made by the insurance company. The law gives the companies the greatest freedom in initiating rates, and really only requires publicity. See sections 2 and 3. Under section 2 the matter of fixing a rate becomes one of public bidding for the risk at rates subject to the approval of the superintendent. It is conceded by all that he may control all provisions of the policy in the interest of fair dealing. Why may he not also exercise a supervision as to the manner of making and the amount of the rate?

That there is a relation between the number of fires, or "fire losses," and insurance rates does not admit of doubt. If an owner can insure his property more cheaply than he can protect it, he will continue to insure and neglect improvement or protection.

This can be established from authorities of which the court takes judicial notice and should consider on this hearing. We ask the indulgence of the court in these citations brought from without the sources of the usual law authorities. The reasonableness of the exercise of the state's power on the matters in question is challenged by the bill in this suit, and we know of no other way in which the arguments which influenced the legislature to act can be produced for the consideration of the court, and the court to see the subject from the standpoint of

those who represented the state in the enactment of the law.

In the Yale Lectures on Fire Insurance, Professor Zartman, 1909, page 213, we find the following:

"Along with these improper adjustments of rates another allied charge is made against the fire insurance companies, namely, that the companies will not reduce rates readily when hazards are reduced by the adoption of better forms of construction or of fire prevention devices. Some very good fire insurance men have said that they are not interested in reducing the fire loss; that it is the only function of fire insurance companies to take losses as they find them and assess them on the community. They are right. That is precisely their function; only they must be sure that they are hazards as they find them, and not as they do not find them."

So eminent an authority on current insurance events as the journal, *The Insurance Field*, referring to a statement of Professor Zartman's similar to the one quoted above, November 4, 1909, said:

"It is undoubtedly true that the insurance companies never have taken such a lead. Reductions for improvements were originally compelled by mutual insurers, and the improvements of hazards initiated by them have been taken and exploited by manufacturers of devices, who in turn have taught their customers how to demand and obtain reductions from companies."

The Illinois insurance commission, in a published report, gives as a part of the testimony of Edward Milligan, vice president of the Phœnix Insurance Company, Hartford, the following:

"THE WITNESS: I think, Mr. Chairman, that, as a business, fire insurance is conducted by companies with most satisfaction and with larger profits in the years when fires are plenty; a good number of fires means a good premium account, and, speaking for the company, for the insurance companies, I should say that a reduction of the fire waste would not be a profitable thing."

This increasing fire loss is no trifling matter to the community. Despite highly developed fire departments, the total of annual losses is enormous and conflagrations appalling in their disasters.

In a recent magazine article it is said:

"It is estimated that our annual fire loss and the sum expended for fire protection represents an annual sum equal to

the cost of building the Panama canal." (*Scientific American*, April 23, 1910.)

Do the insurance raters in the interest of private business desire the abolition of conflagrations? Yes, because conflagrations destroy the companies; but the remedy for conflagrations, better construction and intelligent protection, is destruction of three-fourths of the existing volume of premiums. Fire hazard is thus the working partner of fire insurance. The schedule of his working hours shows neither time for sleep nor vacation.

From page 200, Yale Lectures, Professor Zartman: "No one can doubt that the rates of fire insurance have a tremendous effect upon the character of construction."

The national board of underwriters, an organization of insurance men, devoted to the discussion of scientific insurance problems, says in the pamphlet issued by it:

"Without the influence of such discriminating rates there would be little or no inducement for safe buildings or for proper attention to fire extinguishing facilities. *Any system of insurance rating which does not discriminate between safe construction and unsafe construction and between carefulness and negligence is an injury to the community and a gross injustice to that better class of citizens who build securely and manage their affairs prudently.*"

It will be argued that the companies in fixing rates and classifications of property as to basic rates attempt to give credit for improvements in the risk and to prevent discrimination among localities and individuals. But can anything more clearly show that supervision of rates is a governmental function than these attempts, *bona fide* or not, on the part of private business? The state can enforce such rates, it can compel the companies to write insurance at rates based upon the actual fire hazard of a community or of a certain property, or else the company must retire from the state.

The statute in question seeks to prevent discrimination between individuals and localities. It is a well-known fact that discrimination is the mother of combination and monopoly, and that rebates and preferences constitute their chief weapons of attack and defense when they have once sprung into existence. The more unfair the price to a part of the community the greater the effort to keep it from sinking to a common or the

natural level. Discrimination increases the expense account of large business, and combination comes into existence as an excuse to lessen expense of business operation.

Perhaps there is no business outside of those classed as natural monopolies in which combination is so easily maintained as in fire insurance. The large amounts of capital required to enter business, the desirability of uniform rates and the publicity which must be given the business generally, all serve as inducements to combination. For this reason, as well as the desire to prevent fire loss, the state is warranted in taking steps to prevent combinations as to rates and to protect the public from them when they are clandestinely carried on. A startling fact in regard to the effects of combination, taking the country over, is revealed by the published statistics. Business, measured by premiums received, has almost doubled in volume from 1900 to 1909, but the company share, expense account and profit is greater in proportion than ever before. In 1869, the service rate or share of the company was 36.47 cents on each dollar of premiums collected, but after years of admitted combination and coöperation to reduce the cost of doing business and the charge to the public the service rate for the three years ending with 1909 is 41.75 cents.

XIII.

Classifications and basic rates.

Sections 1 and 5 of the Kansas rating law requires the filing of basic rates and classification of rates and give the superintendent authority over these matters. The necessity for this and its influence in determining fair insurance rates can be seen from a short journey into insurance literature. It is through unfair classification of property for the purpose of assessing the insurance tax that private business, either ignorantly or otherwise, assesses a part of the cost of fire losses of one community against another and of one class of property against another. The remedy for this has long been the subject of discussion among insurance writers.

In April, 1892, the *Spectator*, which is the most notable insurance journal of the world, had the following editorial:

"*The Remedy.* The disinclination (to use a mild term) of the companies to exchange experience leaves but one practical alternative in order to acquire the requisite data for ascertain-

ing the cost price and thus paving the way to meet the demand for compulsory rates hereafter.

"The remedy is in a compulsory classification regulated by law.

"It is doubtful whether any legislation is required to obtain this end. It is almost certain that if the various insurance departments or the departments of New York, Massachusetts and Illinois were to unite in requiring classification sheets to be filed in the state's archives on or before May 1 of each year, showing the results of the business in detail to the end of the preceding December, the companies would comply, at first grudgingly and reluctantly, but on second thought cheerfully."

On August 25, 1892, the same paper again said:

"The *Weekly Underwriter* objects to the system of compulsory classification advocated by the *Spectator*, on three grounds. The first is that there is no warrant in law for compelling the companies to report their classified experiences. The second is that it is inexpedient, because the veterans do not demand it and the amateur underwriters do not deserve it. The third is that it is decidedly wrong to require the companies to divulge 'business secrets.'

"These objections are not sufficiently powerful, in our judgment, to meet the case.

"To the first we reply, that the discretionary power granted to the state insurance department is broad enough to cover the demand for an itemized statement of losses instead of the sum in full. The present annual statements reveal secrets quite as important as the classification referred to.

"The second objection is amusing. The information sought for and proposed to be embodied in the classification we have proposed is just as necessary and important to the experts as to the novices. The former need enlightenment as to the cost of carrying the different risks as much as the beginners. There is not a man among them who will undertake to tell the precise or even the approximate cost of insurance on any class of property. Any one who is familiar with the incongruous and inconsistent rates now used throughout the country will realize how much of guesswork and how little real knowledge underlies the present system of ratings. The veterans are trying to solve the difficulty by an 'universal schedule,' but while this reduces rates to uniformity it does not touch the core of the difficulty—the cost price as shown by experience.

"The third objection we have anticipated. The companies do object to parting with their secrets; they are justified in their unwillingness. But far beyond the advantages gained by their refusal, it is not difficult to foresee the day when the demands of hostile legislation will put the companies in a very embarrassing position."

The *Spectator*, in a report of the convention of the Fire Underwriters' Association of the Northwest, October 9, 1907, published the following extract from an address before that association by Oscar B. Ryon, a prominent insurance man of the country:

"It is not fair to the public to permit insurance companies to combine in the matter of price to be charged for this very necessary commodity.

"The only middle ground discoverable, and the only place where intervention is possible, is in the state department; and if you want to avoid the evils, the uncertainties and the inconvenience of anticompact laws, meet the people of the state half way; let it be declared to be public policy that the people of the state of Illinois, for example, shall pay a fair and profitable rate of insurance, and instead of establishing rating bureaus, *whose rates on the surface are advisory, but which as a matter of fact are mandatory*, let's have a law which provides that the last authority upon matters of this kind shall be the state department and that all questions of rates shall be finally passed upon by this authority; let the public have the benefit of your classification, or at least let the department know what your experience has been.

"Why not let the insurance companies and the state authorities in conference arrive at some scheme of general classification out of which shall develop some system of uniform and adequate rating. Classification scientifically and intelligently made will soon do away with the so-called preferred classes. The sooner this comes the better for the business."

In a similar report the address of F. W. Offenhauser, presiden National Association of Local Fire Insurance Agents, 1908, is quoted as follows:

"The public should be taught that fire insurance companies are merely the custodians of the trust funds accumulated from the insurance tax and that in fixing the rate of premiums chargeable to each individual risk it is proposed to so classify the business as to exact from no class any more than experience teaches will enable the companies to carry out the contract.

"The insurance tax can only be arrived at through the combined experience of all companies within a given territory and for a term of years. There must be some method of utilizing these results to secure an intelligent distribution of the tax."

From these authorities appear the problems which come from insurance rating as a private business. The advantage of the state over any one company or any private individual in facilities for collecting statistics and its ability to act in the

light of the experience of all companies; its superior power to enforce its regulations as to classifications; its financial strength necessary to bring to its service the most valuable scientific knowledge and mathematical skill, all speak strongly in support of the state undertaking the supervision of the making of the insurance rates, and the equitable distribution of the insurance tax. The companies can accomplish the same result only by combination, and the results from this action produce greater wrongs than those sought to be corrected.

No good reason, therefore, can be urged to show that the legislature has exceeded its powers in the enactment of the rating law in question.

The demurrer seems to have been properly sustained, and we request that the decision be affirmed.

Respectfully submitted, December 8, 1913.

John L. Lawson

Attorney-general.

L. N. Hawkes

Assistant Attorney-general.

Solicitors for Defendants.

F. T. Jackson

Chas Blood Smith

Of Counsel for Defendant.

FILED.
JAN 10 1913
JAMES H. McKENNEY,

120 & 290

Nos. ~~457 & 699.~~ OCTOBER TERM, 1912.

IN THE

Supreme Court of the United States.

GERMAN ALLIANCE INSURANCE COMPANY, Appellant,

vs.

IKE LEWIS, as Superintendent of Insurance of the State of Kansas, Appellee.
(No. 457.)

Appeal from the Circuit Court of the United States for the District of Kansas, First Division. [File No. 22914].

CITIZENS INSURANCE COMPANY OF MISSOURI, Appellant,

vs.

MATT C. CLAY, *et al*, STATE INSURANCE BOARD OF THE STATE OF KENTUCKY, Appellee.
(No. 699.)

Appeal from the District Court of the United States for the Eastern District of Kentucky. [File No. 23274].

MOTION TO ADVANCE.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

In the Supreme Court of the United States.

October Term, 1912. No. 457.

German Alliance Insurance Company, Appellant,

vs.

Ike Lewis, as Superintendent of Insurance of the State of Kansas, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

October Term, 1912. No. 699.

Citizens' Insurance Company of Missouri, Appellant,

vs.

Matt C. Clay et al., *State Insurance Board of the State of Kentucky, Appellee.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

MOTION TO ADVANCE.

On behalf of the appellant in each of the above cases, Thomas Bates, John G. Johnson and Seymour Edgerton respectfully move the court to advance the above-entitled causes and to assign them for hearing at an early date, for the following reasons:—

The appeals are, respectively, in No. 457 from the decree of the Circuit Court of the United States for the District of Kansas, First Division, and in No. 699 from the decree of the District Court of the United States for the Eastern District of Kentucky, in two different suits in equity, the first brought by an insurance company of the State of New York, doing business in the State of Kansas, against the Superintendent of Insurance of the State of Kansas, and the second brought by an insurance company of the State of Missouri, doing business in the State of Kentucky, against the State Insurance Board of the State of Kentucky, seeking for an injunction in each case against the enforcement of the respective acts hereinafter referred to. Both appeals involve the same question, arising in the first case under an Act of the Legislature of the State of Kansas, and in the second case under an Act of the Legislature of the State of Kentucky.

The question is, whether or not legislation practically similar in its vital requirements was violative of the constitution of the United States in providing, substantially, that the Superintendent of Insurance of the State of Kansas, in the first case, and the State Insurance Board of the State of Kentucky, in the second case, should have power to fix the price to be charged for fire insurance by complainants, and other corporations doing a like business in the respective States.

The Act of the Legislature of the State of Kansas provided for the filing with the Superintendent of Insurance of general basis schedules showing the rates on all classes of risks insurable in the State of Kansas, and all charges, credits, &c., which in anywise affect such *risks*, and which

go to make up the rate upon each individual risk in the State. The Superintendent of Insurance is empowered to change the rates so filed upon his own initiative. All fire insurance companies doing business in the State are compelled to write fire insurance at the rates fixed by the Superintendent of Insurance. Farmers' mutual insurance companies organized under the laws of Kansas, and insuring only farm property, are excepted from the provisions of the Act.

The Act of the Legislature of the State of Kentucky created an insurance board to which the companies are compelled to give information in various particulars, which will entail upon them a very large expense. The expenses of the board are also to be paid by the companies. All fire insurance companies doing business in the State are required to publish general basis schedules and to furnish all other information which in any wise affects the rates of fire insurance charged in said State.

Said board is given power to alter any such published general basis schedules. It is also authorized to recall at any time any published general basis schedule and to publish an entirely different schedule in place thereof.

All fire insurance companies doing business in the State of Kentucky are compelled to derive their rates for fire insurance on all classes of risks in the State from the general basis schedules approved by the board.

In the case of German Alliance Insurance Company *vs.* Ike Lewis, Superintendent of Insurance of the State of Kansas, the question arose upon demurrer to complainant's bill. The court sustained the demurrer and appellant elected to stand by its bill, and a decree was thereupon entered dismissing the bill at complainant's costs.

In the case of Citizens' Insurance Company of Missouri *vs.* Matt C. Clay *et al*, constituting the State Insurance Board of the State of Kentucky, the question arose upon an application by complainant for a preliminary injunction restraining defendants from enforcing the Act, the application having been made under the provisions of Section 266 of the Judicial Code. The court denied the motion

for preliminary injunction, and from such order the appeal was perfected to this court.

A speedy determination of the lawfulness of these orders and decrees of the court below thus appealed from is a matter of great public importance. The following, amongst other, reasons for advancing the hearing of the cases are urged:—

1. The passage of rate laws, giving the respective States the power to regulate the prices to be charged for fire insurance by the companies doing business within their respective limits, is being urged, and will undoubtedly be considered in not less than twenty-one States in the West and Middle West, before the first day of April.

2. Rating statutes, such as the Act of the Legislature of Kansas and of the Legislature of Kentucky, complained of, providing for the fixing of rates by the superintendent of insurance and the State insurance board, respectively, require that each risk in the State in which such law prevails shall be rated in accordance with the new rates fixed by the State officials. This entails an enormous expense upon the companies. If these rate laws are enacted, as is suggested, in the different States, before any remedy can be obtained in this court hundreds of thousands of dollars of expense will be entailed in each State upon the insurance companies.

3. The rates have been so reduced in the State of Kansas by the superintendent of insurance, clothed with the power by the Act of the Kansas Legislature complained of, that the fire insurance done in that State by the companies engaged therein has been done, in each year since that law went into effect, at a very great loss, the rates of premiums so fixed being less than the cost to the companies.

4. In Kentucky the State Insurance Board has ordered a reduction to the extent of 25 per centum in the rates of

dwelling house fire insurance, notwithstanding the fact that the companies which did a fire insurance business in that State during the last year, did so with a loss ratio of sixty-eight per centum and an expense ratio of forty per centum. Said new rates will entail an enormous loss upon the companies.

5. The question involved, *i. e.*, whether a State has the right to fix the price at which private corporations or individuals shall sell the commodities in which they deal, is one of great importance to the public and to every one concerned.

6. It is of great importance to all companies doing a fire insurance business to know as promptly as possible, whether such legislation as that complained of is or is not constitutional, because, if it be constitutional, it will be necessary for them to determine whether business can be continued further at the loss which will be entailed; or, if it be unconstitutional, to save the great expense now entailed upon them and the continuous doing of business at a loss, illegally forced upon them.

We are authorized to state that counsel for the appellees, in both cases, concur in this motion.

JOHN G. JOHNSON,
THOMAS BATES,
SEYMOUR EDGERTON,
For Appellants.

GERMAN ALLIANCE INSURANCE COMPANY *v.* LEWIS, SUPERINTENDENT OF INSURANCE OF THE STATE OF KANSAS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

No. 120. Argued December 10, 1913.—Decided April 20, 1914.

The business of insurance is so far affected with a public interest as to justify legislative regulation of its rates.

A public interest can exist in a business, such as insurance, distinct from a public use of property, and can be the basis of the power of the legislature to regulate the personal contracts involved in such business.

Where a business, such as insurance, is affected by a public use, it is the business that is the fundamental thing; property is but the instrument of such business.

Munn v. *Illinois*, 94 U. S. 113; *Budd* v. *New York*, 143 U. S. 517; *Brass* v. *North Dakota*, 153 U. S. 391, demonstrate that a business by circumstances and its nature may rise from private to public concern and consequently become subject to governmental regulation; and the business of insurance falls within this principle.

The fact that a contract for insurance is one for indemnity and is personal, does not preclude regulation.

A general conception of the law-making bodies of the country that a business requires governmental regulation is not accidental and cannot exist without cause.

What makes for the general welfare is matter of legislative judgment, and judicial review is limited to power and excludes policy.

The liberty of contract guaranteed by the Fourteenth Amendment is not more intimately involved in price regulation than in other proper forms of regulation of business and property affected by a public use, and so *held* as to the regulation of rates of fire insurance.

The inactivity of a governmental power, no matter how prolonged, does not militate against its legality when exercised. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366.

Whether rate regulation is necessary in regard to a particular business affected by a public use, such as insurance, is matter for legislative

judgment. This court can only determine whether the legislature has the power to enact it.

A discrimination is not invalid under the equal protection provision of the Fourteenth Amendment if not so arbitrary as to be beyond the wide discretion that a legislature may exercise; and so *held* as to a classification exempting farmers' mutual insurance companies doing only a farm business from the operation of an act regulating rates of insurance.

A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union National Bank*, 207 U. S. 251.

The Kansas statute of 1909, so far as it provides for regulating rates of fire insurance, is not unconstitutional under the Fourteenth Amendment as depriving insurance companies of their property without due process of law, as abridging the liberty of contract or as denying companies charging regular premiums the equal protection of the law by excepting farmers' mutual insurance companies from its operation.

BILL in equity to restrain the enforcement of the provisions of an act of the State of Kansas entitled "An act relating to Fire Insurance, and to provide for the Regulation and Control of rates of Premium Thereon, and to Prevent Discriminations Therein." Chap. 152 of the Session Laws of 1909.

The grounds of the bill are that the act offends the Constitution of the State and of the United States.

A summary of the requirements of the act is as follows:

Sec. 1. Every fire insurance company shall file with the superintendent of insurance general basis schedules showing the rates on all risks insurable by such company in the State and all the conditions which affect the rates or the value of the insurance to the assured.

Sec. 2. No change shall be made in the schedules except after ten days' notice to the superintendent, which notice shall state the changes proposed and the time when they

shall go into effect. The superintendent may allow changes upon less notice.

Sec. 3. When the superintendent shall determine any rate is excessive or unreasonably high or not adequate to the safety or soundness of the company, he is authorized to direct the company to publish and file a higher or a lower rate, which shall be commensurate with the character of the risk; but in every case the rate shall be reasonable.

Sec. 4. No company shall engage or participate in insurance on property located in the State until the schedules of rates be filed nor write insurance at a different rate than the rate named in the schedules, or refund or remit in any manner or by any device any portion of the rates; or extend to any insured or other person any privileges, inducements or concessions except as specified in the schedules.

Sec. 5. Any company making insurance where no rate has been filed shall, within thirty days after entering into such contract, file with the superintendent a schedule of such property showing the rate and such information as he may require. The schedule shall conform to the general basis of schedules and shall constitute the permanent rate of the company.

Sec. 6. The schedules shall be open to the inspection of the public, and each local agent shall have and exhibit to the public copies thereof relative to all risks upon which he is authorized to write insurance.

Sec. 7. No company shall directly or indirectly, by any special rate or by any device, charge or receive from any person a different rate of compensation for insurance than it charges or receives from any other person for like insurance or risks of a like kind and hazard under similar circumstances and conditions in the State. Any company violating this provision shall be deemed guilty of unjust discrimination, which is declared unlawful.

Sec. 8. The superintendent may, if he finds that any

company, or any officer, agent or representative thereof, has violated any of the provisions of the act, revoke the license of such offending company, officer, or agent, but such revocation shall not affect liability for the violation of any other section of the act; and provided that any action, decision or determination of the superintendent under the provisions of the act shall be subject to review by the courts of the State as provided in the act.

Sec. 9. The superintendent shall give notice of any order or regulation made by him under the act, and any company, or any person, city or municipality which shall be interested, shall have the right within thirty days to bring an action against the superintendent in any district court of the State to have the order or regulation vacated. Issues shall be formed and the controversy tried and determined as in other cases of a civil nature, and the court may set aside one or more or any part of any of the regulations or orders which the court shall find to be unreasonable, unjust, excessive or inadequate to compensate the company writing insurance thereon for the risk assumed by it, without disturbing others. The order of the superintendent shall not be suspended or enjoined, but the court may permit the complaining company to write insurance at the rates which obtained prior to such order upon the condition that the difference in the rates shall be deposited with the superintendent to be paid to the company or to the holders of policies as, on final determination of the suit, the court may deem just and reasonable. During the pendency of the suit no penalties or forfeitures shall attach or accrue on account of the failure of the complainant to comply with the order sought to be vacated or modified until the final determination of the suit. Proceedings in error may be instituted in the Supreme Court of the State as in other civil cases, and that court shall examine the record, including the evidence, and render such judgment as shall be just and equitable. No action

shall be brought in the United States courts until the remedies provided by the act shall have been exhausted. If any company organized under the laws of the State or authorized to transact business in the State shall violate the section, the superintendent may cancel the authority of the company to transact business in the State.

Sec. 10. Infractions of the act are declared to be misdemeanors and punishable by a fine not exceeding $100 for each offense, provided that if the conviction be for an unlawful discrimination the punishment may be by a fine or by imprisonment in the county jail not exceeding ninety days, or by both fine and imprisonment.

Sec. 11. No person shall be excused from testifying at the trial of any other person on the ground that the testimony may incriminate him, but he shall not be prosecuted on account of any transaction about which he may testify, except for perjury committed in so testifying; "provided, that nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this State and insuring only farm property."

The bill alleged that it was brought by the German Alliance Insurance Company in behalf of itself and all other companies and corporations conducting a similar business and similarly situated, and that Charles W. Barnes was the duly elected superintendent of fire insurance of the State of Kansas. It alleged the jurisdictional amount, and that the controversy was one arising under the Constitution of the United States and of the State of Kansas. It alleged, further, the following facts, which we state in narrative form, omitting those which relate to the constitution of the State, no assignment of error being based upon them: The appellant, to which we shall refer as complainant, was incorporated under the laws of New York as a fire insurance company in 1879 and immediately entered upon such business, and it has for long periods of

time conducted the business of fire insurance in Kansas and other States of the United States.

The business of fire insurance as conducted by it consists of making indemnity contracts against direct loss or damage by fire for a consideration paid, known as a premium; that the rate or premium is the amount charged for each $100 of indemnity. The property which is the subject of insurance is ordinarily known and designated as the risk. Complainant issues indemnity contracts or fire insurance policies covering all kinds and descriptions of improvements upon real estate and the contents thereof and all kinds and descriptions of personal property and also farm houses, barns and granaries and their contents. The rate of premium varies with the kind of property covered, its physical characteristics and situation, its exposure, the presence or absence of fire protection, and many other causes.

The establishment of the basis rate for the premium to be charged is a matter of technical and mathematical deduction from the experience of all fire insurance companies covering a long period of years and, territorially, the whole civilized world. To make such deduction it is necessary not only to be in possession of the compiled statistics of fire insurance business, but also to be skilled in the mathematical 'theory of probabilities' and in the 'law of large numbers' so as to be able to apply with technical accuracy such laws and such data, and that no one not specially trained as an insurance statistician is competent to make such deductions.

A theoretically correct basis rate having thus been arrived at is subject to variation according to the risk, whether in town or country, and, if in the former, according to the class of town or city in which it is situated. The classification of towns and cities depends upon water supply, fire protection and general physical conditions. In addition to ascertaining the individual risk, if a build-

ing, the size, material of which and the manner in which it is constructed, the character of the occupancy, and the character of the occupancy and construction of adjacent buildings, also the character of the contents of the buildings and the manner in which they are stored and the precautions used to detect and prevent fires, are necessary to be ascertained.

Complainant and others engaged in the insurance business employ a large number of men skilled as inspectors to report upon individual risks, and it is impossible to fix and adjust a reasonable rate of premium for each and every individual risk without the information so obtained and having the same applied by experts. And such training and information are necessary to determine whether a basic rate or actual rate as applied to any particular risk is or is not reasonable, and the respondent is not possessed of the requisite information or special training necessary to qualify for such determination and any conclusion to which he might come would be a mere guess or arbitrary determination; and the provisions of the act can only be properly administered in any event by the employment by the State of a corps of inspectors and experts specially trained in the business of fixing rates of fire insurance.

The complainant has complied with all of the laws of the State and has received the regular license or authorization of the State, to transact the business of fire insurance therein.

It conducts its business by means of resident agents, of which it has seventy-two directly employed; it has a large and valuable established business to secure which it has expended a large sum of money, and to be compelled to give up its business would result in irreparable damage and injury to it. A large number of the fire insurance policies issued by complainant are written upon farm buildings and their contents and in writing such business

it comes into direct competition with various farmers' mutual insurance companies organized and doing business under the laws of the State and insuring only farm property.

The business of fire insurance is purely and exclusively a private business and may be transacted by private persons in their individual capacity or by unincorporated or incorporated companies, that the amount of indemnity and the premium is a matter or private negotiation and agreement, and the act of the legislature of the State of Kansas attempts to regulate the business in so far as the fixing of the rate of premium is concerned and in the attempted regulation distinguishes between fire insurance companies and individuals and partnerships, and thereby denies to complainant and other companies the equal protection of the law, contrary to the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and void.

Under the laws of Kansas, mutual fire insurance companies may be organized, that such companies having a guaranteed fund of $25,000 may do business on a cash basis and accept premiums in cash and that such premium measures the total liability of the insured under the policy either to the company or to its creditors; that by the eleventh section of the act under review, it is provided 'that nothing in this act shall affect farmers' mutual insurance companies, organized and doing business under the laws of this State, and insuring only farm property.' The complainant and many other companies insure farm property and come into direct competition with farmers' mutual companies of the character specified and the act of the legislature in excepting the latter companies deprives complainant of the equal protection of the laws and is therefore repugnant to the Fourteenth Amendment of the Constitution of the United States and is unconstitutional and void.

The business of fire insurance is private, with which the State has no right to interfere, and the right to fix by private contract the rate of premium is a property right of value; the business is not a monopoly either legally or actually, it may not be legally conducted by the National Government or by the State of Kansas or other States under their respective constitutions, and is not a business included within the functions of government. Neither complainant nor others engaged in fire insurance receive or enjoy from the State of Kansas, or any government, state or national, any privilege or immunity not in like manner and to like extent received and enjoyed by all other persons, partnerships and companies, incorporated or unincorporated, respectively, engaged in the conduct of other lines of private business and enterprises. Complainant, therefore, is deprived of one of the incidents of liberty and of its property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The act distinguishes between fire insurance companies and other insurance companies, individuals and persons and distinguishes between insurance and other lines of business and thereby offends the equality clause of the Constitution of the United States.

Complainant, under protest, filed the general basis schedules of its rates as required by the act, which were arrived at by the process hereinbefore set out. On the nineteenth of August, 1909, respondent made a reduction of 12% from the rates as filed and from the rates filed by other companies, with the proviso that it should not apply to residence property, churches, school houses, farm property or special hazards. The order was to become effective September 1, 1909. And it was further ordered that on and after that date the exception of churches and dwelling houses should be eliminated. Complainant notified the superintendent by letter that it would, under

protest, and reserving the rights which it had under the law, comply with the provisions of the order.

The risks included in the order and not excepted therefrom, comprise all ordinary mercantile risks in the State and that the reduction of 12% will result in a rate which is much less than the cost of carrying the risks.

Respondent is threatening to make further reductions and it is proposed to revoke the license of any fire insurance company which may violate the provisions of the act, even though the rates fixed by him may be so low as to be confiscatory and to inflict upon the officers of the company, including complainant, the penalties prescribed for such violation, and such companies and complainant, unless defendant be restrained by injunction, will be obliged to comply with the requirements of the act to their irreparable damage and injury.

Complainant finally alleges that it is not its purpose to attack the orders of respondent on the ground that they were not made in strict compliance with the provisions of the act, but to have the act in its entirety declared to be unconstitutional and void for the reasons alleged, and to have respondent restrained and orders made by him under the provisions of the act enjoined. And such an injunction is prayed.

Respondent filed a demurrer stating that he demurred to so much of the bill as charges the act of the State of Kansas to be repugnant to the constitution of Kansas and the Constitution of the United States. The demurrer was sustained. Subsequently, upon the bill being amended, a general demurrer was filed, which was also sustained by the court, and the bill dismissed. Prior, however, to this action, it having been suggested that the term of office of Charles W. Barnes as superintendent of insurance had expired and that Ike Lewis had succeeded to that office and to all of its duties and powers, he was made defendant in the place and stead of Charles W. Barnes.

Mr. Thomas Bates and *Mr. John G. Johnson*, with whom *Mr. Seymour Edgerton* was on the brief, for appellant:

The business of fire insurance is a private business and the public has no legal right to demand its service. *Am. Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636; *Hunt* v. *Simmons*, 19 Missouri, 583; *Orr* v. *Home Ins. Co.*, 12 La. Ann. 255; *Queen Ins. Co.* v. *State*, 86 Texas, 250.

The State has not the power to fix the rates charged to the public either by corporations or individuals engaged in a private business, and the test as to whether a use is public or not is whether a public trust is imposed upon the property, and whether the public has a legal right to the use which cannot be denied. *Allen* v. *Jay*, 60 Maine, 124; *Am. L. S. C. Co.* v. *Chi. Live Stock Exch.*, 143 Illinois, 210; *Arnsperger* v. *Crawford*, 101 Maryland, 247; *Avery* v. *Vermont El. Co.*, 75 Vermont, 235; *Brown* v. *Gerald*, 100 Maine, 351; *Burlington* v. *Beasley*, 94 U. S. 310; *Ches. & Pot. Tel. Co.* v. *Manning*, 186 U. S. 238; *Citizens Savings Assn.* v. *Topeka*, 20 Wall. 655; *Collister* v. *Hayman*, 183 N. Y. 250; *Dutton* v. *Strong*, 1 Black, 1; *Ex parte Quarg*, 149 California, 79; *Fallsberg Co.* v. *Alexander*, 101 Virginia, 98; *Farmers' Market Co.* v. *P. & R. T. Ry. Co.*, 142 Pa. St. 580; *Gaylord* v. *Sanitary Dist.*, 204 Illinois, 576; *Howard Mills* v. *Schwartz Lumber Co.*, 77 Kansas, 599; *Horney* v. *Nixon*, 213 Pa. St. 20; *Hurley* v. *Eddingfield*, 156 Indiana, 416; *Jacobs* v. *Water Sup. Co.*, 220 Pa. St. 388; *L. & N. R. Co.* v. *West Coast Co.*, 198 U. S. 483; *Ladd* v. *Southern Cotton Co.*, 53 Texas, 172; *Pearce* v. *Spalding*, 12 Mo. App. 141; *People* v. *Steel*, 231 Illinois, 340; *Purcell* v. *Daly*, 19 Abb. N. C. 301; *Queen Ins. Co.* v. *State*, 86 Texas, 250; *Ryan* v. *Terminal Co.*, 102 Tennessee, 111; *Shasta Power Co.* v. *Walker*, 149 Fed. Rep. 568; *Sholl* v. *German C. Co.*, 118 Illinois, 427; *Stock Exchange* v. *Board of Trade*, 127 Illinois, 153; *State* v. *Associated Press*, 159 Missouri, 410; *Tyler* v. *Beacher*, 44 Vermont, 648; *Ulmer* v. *Ry. Co.*, 98

Maine, 579; *Weems Steamboat Co.* v. *People's Steamboat Co.*, 214 U. S. 345.

The regulation of rates and charges in a private business is not within the police power of the State. *Adair* v. *United States*, 208 U. S. 175; *Coffeyville Co.* v. *Perry*, 69 Kansas, 297; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540; *Dobbins* v. *Los Angeles*, 195 U. S. 223; *Ex parte Dicky*, 144 California, 234; *Holden* v. *Hardy*, 169 U. S. 366; *Hurtado* v. *California*, 110 U. S. 535; *In re Berger*, 195 Missouri, 16; *Kreibohm* v. *Yansey*, 154 Missouri, 67; *Lawton* v. *Steel*, 152 U. S. 133; *Lochner* v. *New York*, 198 U. S. 45; *Mugler* v. *Kansas*, 123 U. S. 623; *Muller* v. *Oregon*, 208 U. S. 412; *Munn* v. *Illinois*, 94 U. S. 113; *People* v. *Steele*, 231 Illinois, 340; *People* v. *Coler*, 166 N. Y. 1; *State* v. *Associated Press*, 159 Missouri, 410; *Street* v. *Varney El. Sup. Co.*, 160 Indiana, 338; *West Branch Ex.* v. *McCormick*, 1 Pa. Dist. Rep. 542.

The Kansas rate law of 1909 cannot be sustained as a condition precedent to the right of a foreign corporation to do business in the State. *Ætna Ins. Co.* v. *Jones*, 78 So. Car. 445; *American Co.* v. *Shallenberger*, 183 Fed. Rep. 636; *Cargill* v. *Minnesota*, 180 U. S. 452; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401; *Connolly* v. *Union Pipe Co.*, 184 U. S. 540; *Ins. Co.* v. *Prewitt*, 202 U. S. 246; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *Nat. Council* v. *State Council*, 203 U. S. 151; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *So. Pac. Co.* v. *Denton*, 146 U. S. 202; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *West. Un. Tel. Co.* v. *Kansas*, 216 U. S. 1.

The law cannot be sustained on the ground that it is within the power of the legislature of a State to impose such conditions as it likes upon corporations which derive their right to exist from the State. *Lake Shore &c. R. Co.* v. *Smith*, 173 U. S. 684; *People* v. *Budd*, 117 N. Y. 1; *State* v. *Associated Press*, 159 Missouri, 410.

The business of fire insurance is not a monopoly.

Herriman v. *Menzies*, 115 California, 16; *United States* v. *American Tobacco Co.*, 164 Fed. Rep. 700.

The business of fire insurance is not a proper function of government, nor does it receive special privileges from the State. *Ætna Life Ins. Co.* v. *Coulter*, 115 Kentucky, 787; *Ohio* v. *Guilbert*, 56 Oh. St. 575; *Opinion of the Justices*, 155 Massachusetts, 598; *Id.* 182 Massachusetts, 605; § 4091, Gen. Stat. Kansas, 1909.

A general public interest is not equivalent to a public use. *Lowell* v. *Boston*, 111 Massachusetts, 454; *Matter of Mayor of New York*, 135 N. Y. 253; *Matter of Niagara Falls Co.*, 108 N. Y. 375.

The power to regulate rates and charges is simply the power to take private property for public use. *Charles River Bridge Case*, 11 Peters, 420; *Cole* v. *La Grange*, 113 U. S. 1; *Dodge* v. *Michigan Twp.*, 107 Fed. Rep. 827; 2 Kent's Comm. 333; *Lowell* v. *Boston*, 111 Massachusetts, 454; *Opinion of the Justices*, 155 Massachusetts, 598. See also, as bearing on this subject: *Allnutt* v. *Inglis*, 12 East, 527; *Brass* v. *North Dakota*, 153 U. S. 391; *Budd* v. *New York*, 143 U. S. 517, *S. C.*, 117 N. Y. 1; *State* v. *Edwards*, 86 Maine, 102; *Munn* v. *Illinois*, 94 U. S. 113; *Spring Valley Co.* v. *Schottler*, 110 U. S. 347; *Burlington* v. *Beasley*, 94 U. S. 310; *Dow* v. *Beidelman*, 125 U. S. 680; *Wabash &c. Ry. Co.* v. *Illinois*, 118 U. S. 557; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Noble State Bank* v. *Haskell*, 219 U. S. 104 and 575; *Dodge* v. *Mission Township*, 107 Fed. Rep. 827; *Paul* v. *Virginia*, 8 Wall. 168.

Mr. John S. Dawson, Attorney General of the State of Kansas, with whom *Mr. S. N. Hawks*, *Mr. F. S. Jackson* and *Mr. C. B. Smith* were on the brief, for appellee:

The act complained of is within the police power of the State. *Noble State Bank* v. *Haskell*, 219 U. S. 112 and 575; *German Alliance Ins. Co.* v. *Hale*, 219 U. S. 307; *Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 411; *Jacobson* v. *Mas-*

sachusetts, 197 U. S. 11, 27, 31; *Lake Shore &c. R. R.* v. *Ohio*, 173 U. S. 285, 297; *Citizens Ins. Co.* v. *Clay*, 197 Fed. Rep. 435; *German Alliance Ins. Co.* v. *Barnes*, 189 Fed. Rep. 769.

The act is not repugnant to § 1 of the Fourteenth Amendment, as the State has full power of classification. *Hays* v. *Missouri*, 120 U. S. 68; *Railroad Co.* v. *Mackey*, 127 U. S. 205; *Walston* v. *Nevin*, 128 U. S. 578; *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339; *Giozza* v. *Tiernan*, 148 U. S. 657; *Columbia Southern Ry.* v. *Wright*, 151 U. S. 470; *Marchant* v. *Penna. R. R.*, 153 U. S. 380; *St. Louis & S. F. Ry.* v. *Mathews*, 165 U. S. 1; *Railroad Co.* v. *Matthews*, 174 U. S. 99; *Barbier* v. *Connolly*, 113 U. S. 27; *St. Louis &c. Ry. Co.* v. *Paul*, 173 U. S. 404.

The act is not repugnant to either the due process clause of the Fourteenth Amendment or to the equal protection clause. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283; *Railway Co.* v. *Mackey*, 127 U. S. 204, 208; *Minn. & St. L. Ry.* v. *Beckwith*, 129 U. S. 26; *Davidson* v. *New Orleans*, 96 U. S. 97; *Holden* v. *Hardy*, 169 U. S. 366, 389; *Hooper* v. *California*, 155 U. S. 648; *Paul* v. *Virginia*, 8 Wall. 168, 179; *Ducat* v. *Chicago*, 10 Wall. 410, 415; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566, 573; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 561; *Blake* v. *McClung*, 172 U. S. 239; *Santa Clara County* v. *Southern Pac.*, 118 U. S. 394; *Smyth* v. *Ames*, 169 U. S. 466; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Bank of Augusta* v. *Earle*, 13 Pet. 519; *Paul* v. *Virginia*, 8 Wall. 168; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727; *Phila. Fire Assn.* v. *New York*, 119 U. S. 110; *Fritts* v. *Palmer*, 132 U. S. 282; *Mo. Pac. Ry. Co.* v. *Mackey*, 127 U. S. 209; *Barbier* v. *Connolly*, 113 U. S. 32; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Railway Tax Cases*, 115 U. S. 322; *Home Ins. Co.* v. *New York*, 134 U. S. 606; *Pac. Exp. Co.* v. *Seibert*, 142 U. S. 339; *New York &c.* v. *Bristow*, 151 U. S. 571.

The validity of the act can be sustained under the police power of the State, as well as under the power of the State to regulate corporations created by it, or permitted by it to do business within its borders. *Assurance Co.* v. *Bradford*, 60 Kansas, 85; *Railroad Co.* v. *Matthews*, 58 Kansas, 447; *Gulf R. R. Co.* v. *Ellis*, 165 U. S. 155; *Atkinson* v. *Woodmansee*, 68 Kansas, 74; *Fidelity Life Assn.* v. *Mettler*, 185 U. S. 322; *Railroad Co.* v. *Matthews*, 174 U. S. 96; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28; *N. Y. Life Ins. Co.* v. *Cravens*, 178 U. S. 384; *Insurance Co.* v. *Warren*, 181 U. S. 73; *Commonwealth* v. *Vrooman*, 164 Pa. St. 306; *Doyle* v. *Insurance Co.*, 94 U. S. 535; *State* v. *Mo. Pac. Ry. Co.*, 33 Kansas, 176; *Leavenworth* v. *Water Co.*, 62 Kansas, 643; *Inhabitants of Wayland* v. *Middlesex County*, 4 Gray (Mass.), 500; *Irrigation Co.* v. *Klein*, 63 Kansas, 484; *West* v. *Bank*, 66 Kansas, 524.

The classifications made by the legislature are proper. 4 Supreme Court Encyc. 357; *Heath & Milligan* v. *Worst*, 207 U. S. 354; *Ozan Lumber Co.* v. *Union Natl. Bank*, 207 U. S. 256; *Mobile Co.* v. *Kimball*, 102 U. S. 691; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150; *Missouri, K. & T. R. Co.* v. *May*, 194 U. S. 267.

Insurance is affected by public interest. *State* v. *Insurance Co.*, 30 Kansas, 585; *State* v. *Phipps*, 50 Kansas, 609; *Blaker* v. *Hood*, 53 Kansas, 499, 509; *State* v. *Phipps*, 50 Kansas, 619; Freund on Police Power, §§ 400–401; *Ætna Life Ins. Co.* v. *Hardison*, 199 Massachusetts, 181; *N. Y. Life Ins. Co.* v. *Hardison*, 199 Massachusetts, 190; 3 Selected Essays in Anglo-Am. Legal History, p. 108; Zartman's Yale Readings in Ins. pp. 9–10, and 213; Arnold on Marine Ins. 102; *Munn* v. *Illinois*, 94 U. S. 113; 7 Encyc. U. S. Sup. Ct. Rep. 78; 4 Encyc. U. S. Sup. Ct. Rep. 77; *Northwestern Ins. Co.* v. *Riggs*, 203 U. S. 243; *Phœnix Ins. Co.* v. *Montgomery*, 42 L. R. A. 468; *Exempt Firemen* v. *Roone*, 93 N. Y. 313; *Firemen's Assn.* v. *Louisburg*, 21

Illinois, 511; *Milwaukee* v. *Helfenstein*, 16 Wisconsin, 142.

As to the right to fix rates, see *Winchester Turnpike Co.* v. *Croxton*, 33 L. R. A. 177; *Munn* v. *Illinois*, 94 U. S. 113; *Georgia R. R. Co.* v. *Smith*, 128 U. S. 174; *Allnutt* v. *Lord Hale* (De Portibus Maris, 1 Hargraves Law Tracts, 78); *Mobile* v. *Yuille*, 3 Alabama, 137; *Laurel Fork R. R. Co.* v. *West Virginia Trans. Co.*, 25 W. Va. 324; *Allnutt* v. *Inglis*, 12 East, 527; *People* v. *Budd*, 117 N. Y. 1, *S. C.*, 143 U. S. 517; *Re Annon*, 50 Hun, 415, aff'd 26 N. Y. S. R. 554; *Spring Valley Co.* v. *Schottle*, 110 U. S. 347; *Brass* v. *Stoeser*, 153 U. S. 391, aff'g, 2 Nor. Dak. 482.

As to public interest and public use, see *Budd* v. *New York*, 143 U. S. 517; Freund's Police Power, §§ 304, 378; *People* v. *Formosa*, 61 Hun, 272; *Boxwell* v. *Security Life Ins. Co.*, 193 N. Y. 465; *Lumbermen's Exchange* v. *Fisher*, 150 Pa. St. 475; *Craig* v. *Kline*, 65 Pa. St. 399; *Henry* v. *Roberts*, 50 Fed. Rep. 902; *Genesee Fork Co.* v. *Ives*, 144 Pa. St. 114; *Mobile* v. *Yuille*, 3 Alabama, 137; *Brass* v. *Stoeser*, 153 U. S. 391; *McCarty* v. *Firemen's Ins. Co.*, 73 Atl. Rep. 80; *Civil Rights Cases*, 109 U. S. 62.

As to illegality of fire underwriters associations, see *N. Y. Bd. of Underwriters* v. *Higgins*, 114 N. Y. Supp. 506; *Firemen's Fund Ins. Co.* v. *Helner*, 49 So. Rep. 297; *Continental Co.* v. *Parks*, 142 Alabama, 650, 39 So. Rep. 204; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 565; *Farmers' Ins. Co.* v. *Dobney*, 189 U. S. 301; *Barbier* v. *Connelly*, 113 U. S. 27, 28.

After stating the case as above, MR. JUSTICE MCKENNA delivered the opinion of the court.

The specific error complained of is the refusal of the District Court to hold that the act of the State of Kansas is unconstitutional and void as offending the due process clause of the Fourteenth Amendment of the Constitution of the United States. To support this charge of error,

complainant asserts that the business of fire insurance is a private business and, therefore, there is no constitutional power in a State to fix the rates and charges for services rendered by it. An exercise of such right, it is contended, is a taking of private property for a public use. The contention is made in various ways and, excluding possible countervailing contentions, it is urged that the act under review cannot be justified as an exercise of the police power or of the power of the State to admit foreign corporations within its borders upon such terms as it may prescribe, or of any other power possessed by the State; that no State has the power to impose unconstitutional burdens either upon private citizens or private corporations engaged in a private business.

The basic contention is that the business of insurance is a natural right, receiving no privilege from the State, is voluntarily entered into, cannot be compelled nor can any of its exercises be compelled; that it concerns personal contracts of indemnity against certain contingencies merely. Whether such contracts shall be made at all, it is contended, is a matter of private negotiation and agreement, and necessarily there must be freedom in fixing their terms. And "where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Many elements, it is urged, determine the extending or rejection of insurance; the hazards are relative and depend upon many circumstances upon which there may be different judgments, and there are personal considerations as well—"moral hazards," as they are called.

It is not clear to what extent some of these circumstances are urged as affecting the power of regulation in the State. It would seem to be urged that each risk is individual and no rule of rates can be formed or applied. The bill asserts the contrary. It in effect admits that there can be standards and classification of risks, determined by the

law of averages. Indeed, it is a matter of common knowledge that rates are fixed and accommodated to those standards and classification in pre-arranged schedules, and, granted the rates may be varied in particular instances, they are sufficiently definite and applicable as a general and practically constant rule. They are the product, it is true, of skill and experience, but such skill and experience a regulating body may have as well as the creating body. Indeed, an allegation in the original bill that the superintendent of insurance could not have the requisite technical and mathematical training to determine whether a basic rate or an actual rate as applied to any particular risk was or was not reasonable and that his conclusion, therefore, "would be a mere guess or arbitrary determination" was omitted by an amendment. It would indeed be a strained contention that the Government could not avail itself, in the exercise of power it might deem wise to exert, of the skill and knowledge possessed by the world. We may put aside, therefore, all merely adventitious considerations and come to the bare and essential one, whether a contract of fire insurance is private and as such has constitutional immunity from regulation. Or, to state it differently and to express an antithetical proposition, is the business of insurance so far affected with a public interest as to justify legislative regulation of its rates? And we mean a broad and definite public interest. In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence, which makes the public interest that justifies regulatory legislation. We can best explain by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character. There are other

utilities which are denominated public, such as the furnishing of water and light, including in the latter gas and electricity. We do not hesitate at their regulation nor at the fixing of the prices which may be charged for their service. The basis of the ready concession of the power of regulation is the public interest. This is not denied, but its application to insurance is so far denied as not to extend to the fixing of rates. It is said, the State has no power to fix the rates charged to the public by either corporations or individuals engaged in a private business, and the "test of whether the use is public or not is whether a public trust is imposed upon the property and whether the public has a legal right to the use which cannot be denied;" or, as we have said, quoting counsel, "Where the right to demand and receive service does not exist in the public, the correlative right of regulation as to rates and charges does not exist." Cases are cited which, it must be admitted, support the contention. The distinction is artificial. It is, indeed, but the assertion that the cited examples embrace all cases of public interest. The complainant explicitly so contends, urging that the test it applies excludes the idea that there can be a public interest which gives the power of regulation as distinct from a public use which, necessarily, it is contended, can only apply to property, not to personal contracts. The distinction, we think, has no basis in principle (*Noble State Bank* v. *Haskell*, 219 U. S. 104), nor has the other contention that the service which cannot be demanded cannot be regulated.

Munn v. *Illinois*, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its

uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property without due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, "that when private property is 'affected with a public interest it ceases to be *juris privati*' only" and it becomes "clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large"; and, so using it, the owner "grants to the public an interest in that use, and must submit to be controlled by the public for the common good." And it was said that the application of the principle could not be denied because no precedent could be found for a statute precisely like the one reviewed. It presented a case, the court further said, "for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest.

That the case had broader application than the use of property is manifest from the grounds expressed in the dissenting opinion. The basis of the opinion was that the business regulated was private and had "no special privilege connected with it, nor did the law ever extend to it any greater protection than it extended to all other private business." The argument encountered opposing examples, among others, the regulation of the rate of interest on money. The regulation was accounted for on the ground that the act of Parliament permitting the charging

of some interest was a relaxation of a prohibition of the common law against charging any interest, but this explanation overlooked the fact that both the common law and the act of Parliament were exercises of government regulation of a strictly private business in the interest of public policy, a policy which still endures and still dictates regulating laws. Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid or dangerous until it has become familiar, government—state and National—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired.

Munn v. *Illinois* was approved in many state decisions, but it was brought to the review of this court in *Budd* v. *New York*, 143 U. S. 517, and its doctrine, after elaborate consideration, re-affirmed, and against the same arguments which are now urged against the Kansas statute. Nowhere have these arguments been, or could be, advanced with greater strength and felicity of expression than in the dissenting opinion of Mr. Justice Brewer. Every consideration was adduced, based on the private character of the business regulated and, for that reason, its constitutional immunity from regulation, with all the power of argument and illustration of which that great judge was a master. The considerations urged did not prevail. Against them the court opposed the ever-existing police power in government and its necessary exercise for the public good and declared its entire accommodation to the limitations of the Constitution. The court was not deterred by the charge (repeated in the case at bar) that its decision had the sweeping and dangerous comprehension of subjecting to

legislative regulation all of the businesses and affairs of life and the prices of all commodities. Whether we may apprehend such result by extending the principle of the cases to fire insurance we shall presently consider.

In *Brass* v. *Stoeser*, 153 U. S. 391, *Munn* v. *Illinois* and *Budd* v. *New York* were affirmed. A law of the State of North Dakota was sustained which made all buildings, elevators and warehouses used for the handling of grain for a profit public warehouses, and fixed a storage rate. The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered. It was argued, the court said (p. 402), "that the statutes of Illinois and New York [passed on in the *Munn* and *Budd Cases*] are intended to operate in great trade centers, where, on account of the business being localized in the hands of a few persons in close proximity to each other, great opportunities for combinations to raise and control elevating and storage charges are afforded, while the wide extent of the State of North Dakota and the small population of its country towns and villages are said to present no such opportunities." And it was also urged that the method of carrying on business in North Dakota and the Eastern cities was different, that the elevators in the latter were essentially means of transporting grain from the lakes to the railroads and those who owned them could, if uncontrolled by law, extort such charges as they pleased, and stress was laid upon the expression in the other cases which represented the business as a practical monopoly. A contrast was made between those conditions and those which existed in an agricultural State where land was cheap and limitless in quantity. It was replied that this difference in conditions was "for those who make, not for those who interpret, the laws." And con-

sidering the expressions in the other cases which, it was said, went rather to the expediency of the laws, than to their validity, yet, it was further said, the expressions had their value because the "obvious aim of the reasoning that prevailed was to show that the subject-matter of these enactments fell within the legitimate sphere of legislative power, and that, so far as the laws and Constitution of the United States were concerned, the legislation in question deprived no person of his property without due process of law" (p. 404).

The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in *People* v. *Budd* (117 N. Y. 1, 27), that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege conferred by the public on those affected cannot be supported. "The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation." Is the business of insurance within the principle? It would be a bold thing to say that the principle is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application. In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day. We proceed then to consider whether the business of insurance is within the principle.

A contract for fire insurance is one for indemnity against loss and is personal. The admission, however, does not

take us far in the solution of the question presented. Its personal character certainly does not of itself preclude regulation, for there are many examples of governmental regulation of personal contracts, and in the statutes of every State in the Union superintendence and control over the business of insurance are exercised, varying in details and extent. We need not particularize in detail. We need only say that there was quite early (in Massachusetts 1837, New York 1853) state provision for what is known as the unearned premium fund or reserve; then came the limitation of dividends, the publishing of accounts, valued policies, standards of policies, prescribing investment, requiring deposits in money or bonds, confining the business to corporations, preventing discrimination in rates, limitation of risks and other regulations equally restrictive. In other words, the State has stepped in and imposed conditions upon the companies, restraining the absolute liberty which businesses strictly private are permitted to exercise.

Those regulations exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse, and its estimate of insurance certainly has substantial basis. Accidental fires are inevitable and the extent of loss very great. The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be

the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economists that this is the result of the "substitution of certain for uncertain loss" or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden* v. *Hardy*, 169 U. S. 366; *Griffith* v. *Connecticut*, 218 U. S. 563; *Muller* v. *Oregon*, 208 U. S. 412; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Schmidinger* v. *Chicago*, 226 U. S. 578; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549; *Noble State Bank* v. *Haskell*, 219 U. S. 104.

Complainant feels the necessity of accounting for the regulatory state legislation and refers it to the exertion of the police power, but, while expressing the power in the broad language of the cases, seeks to restrict its application. Counsel states that this power may be exerted to "pass laws whose purpose is the health, safety, morals and the general welfare of the people." The admission is very comprehensive. What makes for the general welfare is

necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited. "The scope of judicial inquiry in deciding the question of *power* is not to be confused with the scope of legislative considerations in dealing with the matter of *policy*. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, Burlington & Quincy Railroad Co.* v. *McGuire*, 219 U. S. 549, 569.

The restrictions upon the legislative power which complainant urges we have discussed, or rather the considerations which take, it is contended, the business of insurance outside of the sphere of the power. To the contention that the business is private we have opposed the conception of the public interest. We have shown that the business of insurance has very definite characteristics, with a reach of influence and consequence beyond and different from that of the ordinary businesses of the commercial world, to pursue which a greater liberty may be asserted. The transactions of the latter are independent and individual, terminating in their effect with the instances. The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary com-

mercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern. It is, therefore, within the principle we have announced.

But it is said that the reasoning of the opinion has the broad reach of subjecting to regulation every act of human endeavor and the price of every article of human use. We might, without much concern, leave our discussion to take care of itself against such misunderstanding or deductions. The principle we apply is definite and old and has, as we have pointed out, illustrating examples. And both by the expression of the principle and the citation of the examples we have tried to confine our decision to the regulation of the business of insurance, it having become "clothed with a public interest," and therefore subject "to be controlled by the public for the common good."

If there may be controversy as to the business having such character, there can be no controversy as to what follows from such character if it be established. It is idle, therefore, to debate whether the liberty of contract guaranteed by the Constitution of the United States is more intimately involved in price regulation than in the other forms of regulation as to the validity of which there is no dispute. The order of their enactment certainly cannot be considered an element in their legality. It would be very rudimentary to say that measures of government are determined by circumstances, by the presence or imminence of conditions, and of the legislative judgment of the means or the policy of removing or preventing them. The power to regulate interstate commerce existed for a century before the Interstate Commerce Act was passed, and the Commission constituted by it was not given authority to fix rates until some years afterwards. Of the agencies which those measures were enacted to

regulate at the time of the creation of the power, there was no prophecy or conception. Nor was regulation immediate upon their existence. It was exerted only when the size, number and influence of those agencies had so increased and developed as to seem to make it imperative. Other illustrations readily occur which repel the intimation that the inactivity of a power, however prolonged, militates against its legality when it is exercised. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366. It is oftener the existence of necessity rather than the prescience of it which dictates legislation. And so with the regulations of the business of insurance. They have proceeded step by step, differing in different jurisdictions. If we are brought to a comparison of them in relation to the power of government, how can it be said that fixing the price of insurance is beyond that power and the other instances of regulation are not? How can it be said that the right to engage in the business is a natural one when it can be denied to individuals and permitted to corporations? How can it be said to have the privilege of a private business when its dividends are restricted, its investments controlled, the form and extent of its contracts prescribed, discriminations in its rates denied and a limitation on its risks imposed? Are not such regulations restraints upon the exercise of the personal right—asserted to be fundamental—of dealing with property freely or engaging in what contracts one may choose and with whom and upon what terms one may choose?

We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that the business of insurance is of monopolistic character and that "it is illusory

to speak of a liberty of contract." It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power.

We have summarized the provisions of the Kansas statute, and it will be observed from them that they attempt to systematize the control of insurance. The statute seeks to secure rates which shall be reasonable both to the insurer and the insured, and as a means to this end it prescribes equality of charges, forbids initial discrimination or subsequently by the refund of a portion of the rates, or the extension to the insured of any privilege; to this end it requires publicity in the basic schedules and of all of the conditions which affect the rates or the value of the insurance to the insured, and also adherence to the rates as published. Whether the requirements are necessary to the purpose, or—to confine ourselves to that which is under review—whether rate regulation is necessary to the purpose, is a matter for legislative judgment, not judicial. Our function is only to determine the existence of power.

The bill attacks the statute of Kansas as discriminating against complainant because the statute excludes from its provisions farmers' mutual insurance companies, organized

and doing business under the laws of the State and insuring only farm property. The charge is not discussed in the elaborate brief of counsel, nor does it seem to have been pressed in the lower court. It is, however, covered by the assignments of error.

The provision of the statute is, "That nothing in this act shall affect farmers' mutual insurance companies organized and doing business under the laws of this State and insuring only farm property." The distinction is, therefore, between coöperative insurance companies insuring a special kind of property and all other insurance companies. It is only with that distinction that we are now concerned. There are special provisions in the statutes of Kansas for the organization of coöperative companies and if the statute under review discriminates between them the German Alliance Company cannot avail itself of the discrimination. A citation of cases is not necessary, nor for the general principle that a discrimination is valid if not arbitrary, and arbitrary in the legislative sense, that is, outside of that wide discretion which a legislature may exercise. A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise. *Ozan Lumber Co.* v. *Union County Bank*, 207 U. S. 251. There are certainly differences between stock companies, such as complainant is, and the mutual companies described in the bill, and a recognition of the differences we cannot say is outside of the constitutional power of the legislature. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557.

Decree affirmed.

MR. JUSTICE LURTON was not present when this case was argued, and took no part in its decision.

MR. JUSTICE LAMAR, dissenting.

I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affect-

ing the safety or morals of the public. It presents no question of monopoly in a prime necessity of life, but relates solely to the power of the State to fix the price of a strictly personal contract. The court holds that fire insurance though personal is affected with a public interest and therefore, that the business may not only be regulated but that the premium or price to be paid to the insurer for entering into that personal contract can be fixed by law.

The fixing of the price for the use of private property is as much a taking as though the fee itself had been condemned for a lump sum—that taking, whether by fixing rates for the use or by paying a lump sum for the fee, has always heretofore been thought to be permissible only when it was for a public use. But the court in this case holds that there is no distinction between the power to take for public use and the power to regulate the exercise of private rights for the public good. That is the fundamental proposition on which the case must stand, and the decision must therefore be considered in the light of that ruling and of the results which must necessarily flow from the future application of that principle. For if the power to regulate, in the interest of the public, comprehends what is intended in the power to take property for public use, it must inevitably follow that the price to be paid for any service or the use of any property can be regulated by the General Assembly. This is so because the power of regulation is all-pervading, as witness the statute of frauds, the recording acts, weight and measure laws, pure food laws, hours of service laws, and innumerable other enactments of that class. And if this power be as extensive as is now, for the first time, decided, then the citizen holds his property and his individual right of contract and of labor under legislative favor rather than under constitutional guaranty. The principle is applied here to the case of insurance; but the nature of that business

and the intangible character of its contracts are such as to indicate the far-reaching effect of the principle announced, and warrants a statement of some of the grounds of dissent.

Insurance is not production; nor manufacture; nor transportation; nor merchandise. And this court in *N. Y. Life Co.* v. *Deer Lodge Co.*, 231 U. S. 495, at the present term, reaffirmed its previous rulings that "insurance is not commerce," "not an instrumentality of commerce," "not a transaction of commerce," "but simply contracts of indemnity against loss by fire." Such a contract is personal and in the State whose statute is under consideration, insurance companies are classed among those "strictly private." *Leavenworth County* v. *Miller*, 7 Kansas, 479, 520. The fact, that insurance is a strictly private and a personal contract of indemnity puts it on the extreme outside limit and removes it as far as any business can be from those that are in their nature public. So that if the price of a private and personal contract of indemnity can be regulated,—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute.

And such laws are not without English precedent. For while no statute ever before attempted to fix the price of a contract of indemnity, [1] yet under a Parliament that sat as a perpetual constitutional convention, with power

[1] The statute fixing the premium rates on surety bonds was held to be void in *Am. Surety Co.* v. *Shallenberger*, 183 Fed. Rep. 636.

to pass bills of attainder, to take property for private purposes and to take it without due process of law, many statutes approaching that now under review were adopted and enforced. Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employé to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employé, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individual. In time, the great injustice in this, was so far recognized that these laws, fixing the price of strictly private contracts, seem to have been repealed, and Lord Ellenborough, while enforcing, as proper, a rate for *public* wharfs, was able to say, in *Allnutt* v. *Inglis*, 12 East, 527, 538, "that the general principle is favored both in law and justice, that every man may fix what price he pleases for his own property or the use of it." But what was a favor in England, that might at any time be withdrawn, was in this country made a constitutional right that could not be withdrawn. For although the practice of fixing prices may have prevailed in some of the Colonies "up to the time of independence," yet, as Judge Cooley says, since independence "it has been commonly supposed that a general power in the State to regulate prices was inconsistent with constitutional liberty." Cooley's Const. Law (7th ed.) 807; Stickney's State Control of Trade, p. 3 and the abstract of English price-fixing statutes, p. 9 *et seq.* That common supposition is rightly founded on the fact

that the Constitution recognizes the liberty to contract and right of private property. They include not only the right to make contracts with which to acquire property, but the right to fix the price of its use while it is held, and the further right to fix the price if it is to be sold. To deprive any person of either is to take property, since there can be no liberty of contract and true private ownership if the price of its use or its sale is fixed by law. That right is an attribute of ownership. *State Tax Case*, 15 Wall. 232, 278, top.

But it may be said that, though insurance is a contract of indemnity and personal, its personal character has not been thought to preclude the many regulatory measures adopted and sustained during the past hundred years.

This is most freely conceded. But it is equally true that the failure for more than 100 years to attempt to fix the rates of insurance is indubitable evidence of the general public and legislative conception that the business of insurance did not belong to the class whose rates could be fixed. That settled usage is not an accident. For rate-making is no new thing, and neither is insurance. Its use in protecting the owner of property against loss; its value as collateral in securing loans; its method of averages and distributing the risk between many persons widely separated and all contributing small premiums in return for the promise of a large indemnity, has been known for centuries. All these considerations were recently pressed upon the court in an effort to secure a ruling that insurance was commerce. In refusing to accede to the sufficiency of the argument, the court in the *Deer Lodge Case* pointed out that the size of the business of insurance did not change the inherent nature of the business itself, saying that "the number of transactions do not give the business any other character than magnitude."

The character of insurance, therefore, as a private and personal contract of indemnity, has not been changed by

its magnitude or by the fact that more policies and for greater amounts are now written than in the centuries during which no effort has ever before been made to fix their rates. It is, however, undoubtedly true that during all of that period *regulatory statutes* were, from time to time, adopted to protect the public against conditions and practices which were subject to regulation. The public had no means of knowing whether these corporations were solvent or not, and statutes were passed to require a publication of the financial condition. The policies were long and complicated, with exceptions, and qualifications, and provisos. They were often unread by the policyholder and sometimes not understood when read. Statutes were accordingly passed providing for a standard form of policy in order to protect the assured against his inexperience, to prevent hard bargains, and to avoid vexatious litigation, and as similar evils appear they may be dealt with by regulatory or prohibitory legislation just as statutes were passed and can still be passed to punish combinations, pooling arrangements, and all those practices which amount to unfair competition.

But these and those referred to in *Attorney General* v. *Firemen's Insurance Co.*, 74 N. J. Eq. 372, furnish instances of the exercise of this power to regulate which can be exerted against any person, trade or business, no matter how great or small. This power to regulate is so much oftener exerted against the large business, because the evils are then more apparent, that the size of the business and the number of persons interested is sometimes referred to as indicating that the business is affected with a public interest. But there is no such limitation. For the power to regulate is the essential power of government which can be exerted against the whole body of the public or the smallest business. And if, as seems to be implied, the fact that a business may be regulated is to be the test of the power to fix rates, it would follow, since all can be

regulated, the price charged by all can be regulated. Or if great size is the test, if the number of customers is the test, if the scope of the business throughout the nation is the test, if the contributions of the many to the value of the business is the test—or if it takes a combination of all to meet the condition,—then every business with great capital and many customers distributed throughout the country and making a large business possible, must be treated as affected with a public interest, and the price of the goods on its shelves can be fixed by law. Then could the price of newspapers, magazines and the like be fixed, because certainly nothing is more affected with a public interest, nothing is so dependent on the public, nothing reaches so many persons and so profoundly affects public thought and public business. Such a business is, indeed, affected with a public interest,—justifying regulation (*Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288), but not the fixing of the price of the paper or periodical or the rates of advertising. For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. *Missouri Pacific* v. *Nebraska*, 164 U. S. 403. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employé, in order to support himself and family.

It is said, however, that the validity of rate statutes has often been recognized, notably in the *Munn Case* (94 U. S. 113, 126) where a statute was sustained which regulated the price to be charged for storing grain in elevators.

The *Munn Case* is a landmark in the law. It is accepted

as an authoritative and accurate statement of the principle on which the right to fix rates is based. But the statute there under review did not undertake to fix the price of a personal contract, but to fix the price for the use of property, once private, but then public. The reasoning of the court clearly shows that in order to regulate rates, two things must concur—(1) the business must be affected with a public interest; and (2) the property employed in such business must be devoted to a public use. The basic principle of the decision was the oft quoted saying of Lord Hale that "when private property is affected with a public interest, it ceases to be *juris privati* only." The decision in the *Munn Case* was but an application of that terse statement and was applied in a case where the elevators had been devoted to a public use. This will distinctly appear from the statement by the court of the question involved and decided. For after reviewing and applying Lord Hale's pithy saying and reviewing the other authorities the court said (italics ours):

"Enough has already been said to show that, when private *property is devoted to a public use*, it is subject to public regulation. It remains only to ascertain whether the *warehouses* of these plaintiffs in error, and the business which is carried on *there*, come within the operation of this principle" (p. 130).

Not only does the *Munn Case* show that the right to fix prices depends on the concurrence of public interest and the employment of property devoted to a public use, but with the exception of the *Louisiana Bread Case*, 12 La. Ann. 432, it is believed that every American rate-statute since the requirement that property should not be taken without due process of law, related to a business which was public in its character and employed visible and tangible property which had been devoted to a public use.

The list of rate-regulated occupations is not too long to be here given. It includes canals, waterways and

booms; bridges and ferries; wharves, docks, elevators and stockyards; telegraph, telephone, electric, gas and oil lines; turnpikes, railroads and the various forms of common carriers, including express and cabs. To this should be added the case of the inn-keeper (as to which no American case has been found where the constitutional question as to the right to fix his rates has been considered), the confessedly close case of the irrigation ditches for distributing water (189 U. S. 439), and the toll mill acts. This of course does not include the case of condemnation for governmental purposes or for roads and ways where no question of rates is involved. There may be other instances not found, but it is believed that the foregoing numeration exhausts the list of what has heretofore been treated as a public business justifying the exercise of the price-fixing power against persons or corporations.

It is to be noted that in each instance the power to regulate rates is exercised against a business which in every case used tangible property devoted to a public use. Some of them had a monopoly (*Spring Water Co.* v. *Schottler*, 110 U. S. 347, 354). Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had been thus taken by law, fixed by law. And as further pointing out the characteristics of the public use justifying the fixing of prices, it will be noted that, with the exception of toll mills (which, however, do employ property devoted to a public use), they all have direct relation to the business or facilities of transportation or distribution—to transportation by carriers of passengers, goods or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, storage or accommodation of property before the journey begins, when it ends, or along the way.

When thus enumerated, they appear to be grouped around the common carrier as the typical public business and all employing in some way property devoted to a public use.

It will be seen, too, that the size of the business is unimportant, for the fares of a cabman, employing a broken-down horse and a dilapidated vehicle, can be fixed by law as well as the rates of a railroad with millions of capital and thousands of cars transporting persons and property across the continent.

The fact that rate-statutes, enacted and sustained since the adoption of constitutional government in this country, all had some reference to transportation or distribution, is a practical illustration of the accepted meaning of "public use" when that phrase was first employed in American constitutions, and when turnpikes and carriers, wharfingers and ferrymen had rates, tolls and fares fixed by law. No change was made in the meaning of the words or in the principle involved when it opened to take in new forms and facilities of transportation, whether by vehicle, pipe or wire, and new forms of storage, whether on the wharf or in the grain-elevator.

But it is said that business is the fundamental thing and the property but an instrument, and that there is no basis for the distinction between a public interest and a public use. But there is a distinction between a public interest—justifying regulation—and a public use—justifying price fixing. "Public interest and public use are not synonymous." *In re Niagara Falls Ry. Co.*, 138 N. Y. 375, 385. And since the case here involves the validity of a Kansas statute it is well to note that the Supreme Court of that State in *Howard* v. *Schwartz*, 77 Kansas, 599, recognizes that there is a difference and adjudges accordingly. It there cited numerous decisions from other States and in defining a public use, made the following quotation from the opinion of the Supreme Court of Maine:

"'Property is devoted to a public use when, and only when, . . . all the public has a right to demand and share in'" it " . . . In a broad sense it is the right in the public to an actual use, and not to an incidental benefit." (p. 608).

The effect of the difference between public use and public interest appears from the application; for the Supreme Court of Kansas on the authority of this and numerous other cases, held that a steam flour mill was not such a public use as would authorize its owners to exercise the power of eminent domain, though it was "a useful and important business instrumentality which contributed to the growth and development of the locality where the [mills] are situated. This may also be said, however, of every legitimate business. To a limited extent every honest industry adds to the general sum of prosperity and promotes the public welfare" (p. 609).

Nothing more can be said of insurance—nor can the power to take the private property of insurers, by fixing rates, be enlarged by a legislative declaration that the business is affected with a broad and definite public interest. For since the contract of insurance is private and personal, it is almost a contradiction in terms to say that the private contract is public or that a business which consists in making such private contracts is public in the constitutional sense. The fundamental idea of a public business, as well declared by the Supreme Court of Kansas, 77 Kansas, 608, is that "all the public has a right to demand and share in" it. That means that each member of the public on demand and upon equal terms, without written contract, without haggling as to terms, may demand the public service, and secure the use of the facility devoted to public use. If the company can make distinctions and serve one and refuse to serve another, the business *ex vi termini* is not public. The common carrier has no right to refuse to haul a passenger even if he has been

convicted of arson. But if an insurance company is indeed public it is bound to insure the property of the man who is suspected of having set fire to his own house, or whose statements of value it is unwilling to take. This is manifestly inconsistent with the contract of insurance which requires the utmost good faith, not only in making truthful answers to questions asked, but in not concealing anything material to the risk. If the company has the discretion to insure or the right to refuse to insure, then, by the very definition of the terms, it is not a public business. If, on the other hand, the company is obliged to insure bad risks or the property of men of bad character, of doubtful veracity or known to be careless in their handling of property the law would be an arbitrary exertion of power in compelling men to enter into contract with persons with whom they did not choose to deal where confidence is the very foundation of a contract of indemnity. Indeed, it seems to be conceded that a person owning property is not entitled to demand insurance as a matter of right. If not, the business is not public and not within the provision of the Constitution which only authorizes the taking of property for public purposes—whether the taking be of the fee for a lump sum assessed in condemnation proceedings, or whether the use be taken by rate-regulation, which is but another method of exercising the same power.

The suggestion that the public interest is found in the characteristics of the business of insurance, justifies a brief examination of those characteristics and a statement of the results that logically must follow from such a test. For if the power is to develop out of the characteristics, it must necessarily follow that other occupations, having similar characteristics, must be subject to the same rate-regulating power.

The elements which are said to show that insurance is affected with a public interest do not arise out of the size of any one company, but out of the volume of the aggre-

gate business of all the companies doing business within the State and beyond its borders. If that test be applied, and if the sum of the units is to determine whether or not a business is affected with a public interest (which is said to be the equivalent of a public use), then if the principle of the decision be applied to the business of farming all can see to what end it leads. In view of the amount of property employed and the aggregate number of persons engaged in agriculture and the public's absolute dependence upon that pursuit, it would follow that, farming being affected with a broad and definite public interest, the price of wheat and corn; cotton and wools; beef, pork, mutton and poultry; fruit and vegetables, could be fixed. Or if we take the aggregate of those who labor and consider the public's absolute dependence upon labor, it would inevitably follow that it, too, was affected with a broad and definite public interest and that wages in the United States of America in this Twentieth Century could be fixed by law, just as in England between the 14th and 18th centuries. And inasmuch as the prices of agricultural products are dependent on the price of land and labor, and as the price of labor is closely related to the cost of rent and food and clothes and the comforts of life, there would be the power to take the further step and regulate the cost of everything which enters into the cost of living. Of course, it goes without saying that if the rates for fire insurance can be fixed, then the rates for life and marine insurance can be fixed. By a parity of reasoning the rates of accident, guaranty and fidelity insurance could also be regulated. There seems no escape from the conclusion that the asserted power to fix the price to be paid by one private person to another private person or private corporation for a private contract of indemnity, or for his product, or his labor, or for his private contracts of any sort, will become the center of a circle of price-making legislation that, in its application, will destroy the right of

private property and break down the barriers which the Constitution has thrown around the citizen to protect him in his right of property—which includes his right of contract to make property, his right to fix the price at which his property shall be used by another. By virtue of the liberty which is guaranteed by the Constitution, he also has the right to name the wage for his labor and to fix the terms of contracts of indemnity,—whether they be contracts of endorsement or suretyship, or contracts of indemnity against loss by fire, flood, or accident.

In view of what Judge Cooley calls the general supposition that "the right to fix prices was inconsistent with constitutional liberty," it is not surprising that little is to be found in the books relating to a statute like this. It is, however, somewhat curious that among the few expressions to be found on the subject, is the intimation by Lord Ellenborough in *Allnutt* v. *Inglis*, 12 East, 527, 535, that insurance rates were not on the same basis as a public business using property devoted to a public use. For in answering the argument that if the rates of a public wharf could be fixed, insurance rates could also be fixed, he clearly intimates that this could not be done, since the wharf was a monopoly and "the business of insurance and of counting-houses may be carried on elsewhere."

In the following cases the statutes fixing prices have been held to be void. *Ex parte Dickey*, 144 California, 234, fixing the price to be charged by an employment bureau; *Ex parte Quarg*, 149 California, 79; *People* v. *Steele*, 231 Illinois, 340, prohibiting the sale of theater tickets at a price higher than that charged by the theater; *State* v. *Fire Creek Coke Co.*, 33 West Va. 188, limiting the profits on sales to employés. See also *State* v. *McCool*, 83 Kansas, 428, 430, bot., where in sustaining a statute regulating the weight of bread the court called attention to the fact that the statute did not attempt to fix the price. To these could be added a multitude of decisions showing that the power

to regulate is limited by the constitutional prohibition against the taking of private property. *Guillotte* v. *New Orleans*, 12 La. Ann. 432, is the only American case found which sustains the right to fix prices for other than a commodity or service furnished by a public utility company of the kind already pointed out. In that case the court said that the city could fix the price of bread and that if the baker did not desire to do business within the limits of such city he could go elsewhere. That reasoning would support any statute, for every citizen at least has the right to go out of business. But it has been repeatedly held by this court that such an answer cannot sustain an invalid statute, the Constitution being intended to secure the citizen against being driven out of business by an unconstitutional statute or regulation.

There is, in the opinion an allusion to usury laws as instances of fixing rates for other than public service corporations. We do not understand that the opinion is founded on that proposition, for even the usury laws do not fix a flat rate, but only a maximum rate, and do not require lenders to make loans to all borrowers, similarly situated, at the same rate of interest. Moreover interest laws were in their inception not a restriction upon the right of contract but an enlargement, permitting what theretofore had been regarded both as an ecclesiastical and civil offense. This fact may have been coupled with the idea that as the sovereign had the prerogative to coin money and make legal tender for all claims, he could fix the price that should be charged for the use of that money.

At any rate, interest laws had been long recognized before the Constitution and have been prevalent ever since. They, therefore, fall within the rule that contemporary practice, if subsequently continued and universally acquiesced in, amounts to an interpretation of the Constitution. But the same character of long continued ac-

quiescence and settled usage that sustains a usury law also sustains the right of the contracting parties to agree upon the charge for insurance. For centuries before the Constitution, and continuously ever since they have themselves fixed this charge, and this makes most strongly in favor of their right to continue to agree upon the price of a private contract of indemnity against loss by fire.

The act now under review not only takes property without due process of law but it unequally and arbitrarily selects those from which such property shall be taken by price fixing. Although including all other fire insurance companies, it excepts certain mutual insurance companies. *Persons* engaged in doing an insurance business are not within its terms. In Kansas, the right to do a fire insurance business is not limited to corporations, but may be conducted by persons, individuals, partners, companies and associations, whether incorporated or not. General Statutes of Kansas (1909), §§ 4086, 4091, 4122. And if it could be true that the legislature could fix the price of insurance it would seem to be doubly necessary that all doing an insurance business should be treated alike. There is no difference in principle and none by statute in the character of the contract, whether it is made by one man, or the Lloyds, or a corporation. There is no difference in the character of the contract made by a stock company and a mutual company. In each instance the contract is one of indemnity against loss for a fixed premium. If the policy-holder is a stockholder in an ordinary corporation, he may get back some of his premium by way of dividends; if he is a member of a mutual company, he pays his premium and gets back his share of the earnings. But to say that the State may fix the price to be charged for insurance by a stock company and that it will not fix the price to be charged by mutual companies or by the Lloyds, who do an enormous business of exactly the same nature on exactly

the same sort of property and on exactly the same terms, is to make a discrimination which amounts to a denial of the equal protection of the law.

THE CHIEF JUSTICE and MR. JUSTICE VAN DEVANTER concur in this dissent.